TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 95.

JOHN W. McDONALD, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA, APPELLANT,

vs.

DAVID E. THOMPSON.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JUNE 26, 1901.

(17,814.)

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, A. D. 1899, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in December, to wit, the fourth day of December, A. D. 1899, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the thirtieth day of September, A. D. 1899, a transcript of record, pursuant to an appeal allowed by the circuit court of the United States for the district of Nebraska, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in the case wherein John W. McDonald, receiver of the Capital National Bank of Lincoln, Nebraska, was appellant, and David E. Thompson was appellee; which said transcript of record is in the words and figures following, to wit:

1 Pleas before the Honorable William H. Munger, judge of the district court of the United States for the district of Nebraska, and sitting in the circuit court of the United States for the district of Nebraska, within the eighth judicial circuit, at the regular November, 1898, term thereof.

Be it remembered, that on the 20th day of May, 1898, bill of complaint was filed in the clerk's office of said circuit court, which said bill of complaint is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant,
vs.
DAVID E. THOMPSON, Respondent. } Bill.

To the judges of the circuit court for the district of Nebraska:

Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, brings this his bill against David E. Thompson and thereupon your orator says:

That the said Capital National Bank of Lincoln, Nebraska, is a banking association organized and lately doing business under and by virtue of the laws of the United States, located within the State and district of Nebraska.

That said David E. Thompson is a resident of the city of Lincoln and a resident and citizen of the State of Nebraska.

That on or about the 23rd day of January, 1893, the said Capital National Bank of Lincoln failed, and became and was insolvent, and the Comptroller of the Currency of the United States became and was satisfied of the insolvency of the said Capital National Banking Association; that thereupon, on or about the 6th day of February, 1893, after due examination of the affairs of the said association, the said comptroller appointed one John D. MacFarland receiver of said Capital National Bank of Lincoln; that said John D. MacFarland qualified as such receiver, entered upon the duties of the said office, took possession of said bank, its books, records and assets, and proceeded to close up the said association. That on or about the 4th day of May of the year last aforesaid, the said John D.
2 MacFarland resigned his said office of receiver of said bank, which said resignation was duly accepted by the said comptroller; that thereupon, and afterwards, the plaintiff was duly appointed receiver of the said Capital National Bank of Lincoln by the said Comptroller of the Currency, to succeed the said John D. MacFarland; that on or about the 31st of May, 1893, the plaintiff having been duly appointed as aforesaid duly qualified as such receiver of the Capital National Bank of Lincoln, entered upon the duties of said office, took possession of said bank, its books, records and assets, and proceeded to close up said association, and is now engaged in winding up the affairs of said bank.

Your orator further alleges that on or about the 10th day of June, 1893, the Comptroller of the Currency of the United States at the city of Washington in the District of Columbia, made, issued, declared, signed, sealed with the seal of his office and published his order and proclamation of that date in and by which he declared that: Whereas, upon a proper accounting by the receiver theretofore appointed to collect the assets of the Capital National Bank of Lincoln, Nebraska, and upon a valuation of uncollected assets remaining in his hands, it did appear to the satisfaction of said comptroller that in order to pay the debts of said association it is necessary to enforce the individual liability of the stockholders therefor to the extent thereinafter mentioned as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States; that thereupon, by virtue of the authority in him vested by law, he did thereby make assessment and requisition upon the shareholders of the said Capital National Bank of Lincoln, for three hundred thousand dollars to be paid by them ratably on or before the 10th day of July, 1893; and that he did thereby make demand upon each and every share of the capital stock of said association held or owned by them respectively at the time of its failure, and thereby direct your orator by the name and designation of K. K. Hayden, the receiver theretofore appointed, to take all necessary proceedings by suit or otherwise to enforce to that extent the individual liability of the said shareholders.

Your orator further alleges and represents to your honors that on the 23rd day of April, 1891, and for a long time previous thereto, the said respondent David E. Thompson was the owner of and had standing in his name two hundred and ten shares of the capital

stock of the said Capital National Bank of Lincoln upon the books of said association, and that upon and for a long time previous to the said last-mentioned date the said defendant David E. Thompson was a director of the said Capital National Bank of Lincoln.

3 That on the 23rd day of April, 1891, for a long time prior thereto and thereafter until said bank closed its doors, the said Capital National Bank of Lincoln was in a failing condition, and was in fact insolvent, which was known to said David E. Thompson personally as well as officially, in his capacity as such director.

Your orator further represents to your honors that the said David E. Thompson, respondent herein, being fully advised of and knowing the failing condition and insolvency of the said bank, and in expectation and anticipation of the early and near approaching failure of the said bank, and the necessary enforcement of his liability as a shareholder, and to defraud the said bank, its depositors and crediters out of the security afforded by the law upon the shareholders of national banks, and to render it impossible in the case of the failure of said bank which the said respondent believed and had reason to believe was imminent and could not be long delayed, to place it out of the power of the Comptroller of the Currency to enforce the contingent liability of him, the said respondent David E. Thompson, to contribute not to exceed one hundred cents on the dollar of the par value of the shares of stock owned and held by him as hereinafter stated, in case of the failure of said bank, and its inability to pay its depositors and other creditors out of its ordinary resources, and without resorting to an assessment upon its capital stock in the hands of its shareholders, and for the purpose of avoiding such liability, and cheating, wronging and defrauding the said bank, its depositors and creditors, the Comptroller of the Currency and the receiver of the said bank, of their lawful rights and remedies in the premises, did on or about the 14th day of November 1891, sell and cause to be transferred on the books of the said bank, by proceedings regular in form, but which your orator upon information and belief avers, were, and are, colorable only, and not made in good faith, one hundred and eighty shares of the capital stock of the Capital National Bank of Lincoln, Nebraska, so owned and held by him as aforesaid to Charles W. Mosher and Richard C. Outcalt, whom your orator has been informed and believes, and so charges upon information and belief, are, and were at the date last aforesaid, pecuniarily irresponsible persons, of or from whom the amount of such assessment of one hundred dollars upon each share of the capital stock so owned and held by said respondent David E. Thompson cannot be made by legal process or otherwise.

Your orator further avers that the said David E. Thompson, being fully advised of and knowing the failing condition and insolvency of the said bank, and in expectation and anticipa-

4 tion of the early and near approaching failure of the said bank and its inability to pay its depositors and other creditors out of the ordinary resources and without resorting to an assessment of the capital stock in the hands of its shareholders, and for the purpose of avoiding such liability and cheating, wronging

and defrauding the said bank, its depositors and creditors, the Comptroller of the Currency and the receiver of the said bank of their lawful rights and remedies in the premises, did, on or about the 23rd day of April, 1891, (but the records of said bank erroneously show said sale was made December 10, 1890), sell and cause to be transferred on the books of said bank by proceedings legal in form but which your orator on information and belief avers were colorable only, and not made in good faith, thirty shares of the capital stock of the said Capital National Bank of Lincoln, Nebraska, so owned and held by him as aforesaid, to Esther C. Barton, whom your orator has upon information and belief, and so charges upon information and belief, is and was at the date last aforesaid, not a pecuniarily responsible person, of or from whom the amount of such assessment of one hundred dollars upon each share of the capital stock so owned and held by said respondent David E. Thompson cannot be made by legal process or otherwise.

So that your orator by reason of the pretended sale and transfer of said shares of stock by and from the said respondent David E. Thompson to the said Charles W. Mosher, Richard C. Outcalt, Esther C. Barton and the insolvency of the said transferees, and their pecuniary inability to respond in damages as hereinbefore stated and set forth, your orator is deprived of his remedy at law for the collection of so much of the assessment of three hundred thousand dollars made upon the capital stock of the said Capital national bank, as is applicable to the shares thereof owned and otherwise held by said respondent David E. Thompson; all of which actions and doings of the said respondent are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises.

In tender consideration whereof, and forasmuch as your orator is entirely remediless by the strict rules of the common law, and can only have relief in a court of equity where matters of this kind are properly cognizable, to the end therefore, that the said David E. Thompson, respondent herein, may full, true, direct and full answer make to all and singular the matters hereinbefore stated and charged as fully and particularly as though the same were hereinafter repeated, and he thereunto distinctly interrogated, but the answer in or under oath of the said respondent is hereby waived.

5 And the complainant prays that upon consideration thereof your honors find that the said respondent David E. Thompson is the true and lawful owner of the two hundred and ten shares of the capital stock of the Capital national bank hereinbefore mentioned, and that the transfer of the said shares of stock by the said David E. Thompson to the said Charles W. Mosher, Richard C. Outcalt, Esther C. Barton may be set aside, and may adjudge and decree that he pay to your orator the assessment thereon made by the Comptroller of the Currency as hereinbefore stated, to the sum and amount of twenty-one thousand dollars, together with lawful interest on said sum from 10th day of July, 1893, together with

costs of this action and a reasonable solicitor's fee for its conduct and prosecution.

And that your orator may have such other and further relief in the premises as may be agreeable to equity and good conscience.

May it please your honors to grant unto your orator a writ of subpœna issuing out of this honorable court in equity, to be directed to the said David E. Thompson, thereby commanding him under a certain penalty therein to be specified, to be and appear personally before your honors on a certain day, then and there to answer all and singular the premises, and to stand to and perform and abide by such order and decree therein as to your honors shall seem meet, and your orator will ever pray.

COBB & HARVEY,
Solicitors for Complainant.
JOHN H. AMES, *Of Counsel.*

Indorsed: Filed May 20, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit: on the 20th day of May, 1898, præcipe was filed in said case, which said præcipe is in words and figures following, to wit:

In the Circuit Court of the United States of America for the District of Nebraska.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Plaintiff,
vs.
DAVID E. THOMPSON, Defendant. } Præcipe.

To the clerk of said court:

Upon filing the bill herein, you will issue a subpœna in this action for David E. Thompson, respondent, returnable according to law and the practice of this court.

6 The plaintiff prays judgment for $21,000.00 with interest from the 10th day of July, 1893.

Dated May 19, 1898.

COBB & HARVEY,
Solicitors for the Complainant.
JOHN H. AMES, *Of Counsel.*

Indorsed: Filed May 20, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 20th day of May, 1898, chancery subpœna was duly issued in said case, and returned and filed on the 14th day of June, 1898, which said chancery subpœna is in words and figures following, to wit:

UNITED STATES OF AMERICA, }
District of Nebraska. }

The President of the United States of America to David E. Thompson, Greeting:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the circuit court of the United States, for the district of Nebraska, on the first Monday of July next, at the city of Omaha, then and there to answer the bill of complaint of Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, this day filed against you; hence fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of May, 1898. Issued at my office in the city of Omaha, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.]

OSCAR B. HILLIS, *Clerk*,
By R. C. HOYT, *Deputy*.

MEMORANDUM.—The above-named defendants to enter *their* appearance in this suit in the clerk's office aforesaid, on or before the day at which this writ is returnable; otherwise the bill may be taken *pro confesso*.

OSCAR B. HILLIS, *Clerk*,
By R. C. HOYT, *Deputy*.

COBB & HARVEY,
Complainant's Solicitors.

Attached to said subpœna is the return of the marshal in words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss*:

I hereby certify and return, that on the 30th day of May, 1898, I received this subpœna in chancery, and on the 30th day of May, 1898, I served the same upon the within-named David E. Thompson, at Lincoln, in Lancaster county, State and district of
7 Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

GEO. H. THUMMEL,
United States Marshal for the District of Alaska,
By CHAS. W. PEARSALL,
Deputy United States Marshal.

Marshal's costs, $6.00.

Indorsed: Filed June 14, 1898. Oscar B. Hillis, clerk.

Thereupon, afterwards, to wit, on the 4th day of July, 1898, appearance of defendant was filed in said case, which said appearance is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant, *vs.* DAVID E. THOMPSON, Defendant.	204, "T."	In Chancery.

Appearance of Defendant.

The defendant David E. Thompson, by Charles E. Magoon and Halleck F. Rose, his solicitors, hereby enters his appearance herein to the bill of complaint of Kent K. Hayden, receiver of the Capital National Bank, of Lincoln, Nebraska, complainant, and requests that the same be entered of record in said case by the clerk of said court.

Dated July 2, 1898.

CHARLES E. MAGOON AND
HALLECK F. ROSE,
Solicitors for Defendant, David E. Thompson.

Indorsed: Filed Jul- 4, 1898. Oscar B. Hillis, clerk.

Thereupon, afterwards, to wit, on the 18th day of July, 1898, demurrer of David E. Thompson was filed in said case, which said demurrer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant, *vs.* DAVID E. THOMPSON, Defendant.	204, "T."	In Chancery.

The demurrer of David E. Thompson, defendant, to the bill of complaint of Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, the above-named complainant.

8 This defendant, by protestation, not confessing any or all of the matters and things in the plaintiff's bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth:

1. That the complainant hath not in and for his said bill made or stated such a case as entitles him, in a court of equity, to any discovery from this defendant, or to any relief against him, as to the matters contained in said bill, or any of such matters.

2. That it appears by the said bill that Charles W. Mosher, Richard C. Outcalt and Esther C. Barton, mentioned and described

in said bill, and the prayer thereof, as transferees of the certain two hundred and ten shares of the capital stock of the Capital national bank, alleged to have been previously held by defendant, and each of them, are necessary parties defendant, without whom no proceedings can be had or taken to annul or set aside such transfer, as by the bill prayed, and there is a defect of parties defendant to said bill.

3. That the plaintiff is not entitled upon said bill to the relief he prays for, because he had a plain and adequate remedy at law.

4. That it appears by the said bill that the cause of action therein set forth and by complainant sought to be enforced against defendant accrued more than four years prior to the commencement of suit and is barred by the statute of limitations.

Wherefore, and for divers other good causes of demurrer appearing in said bill, the defendant doth demur thereto, and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

DAVID E. THOMPSON, *Defendant*,
By CHAS. E. MAGOON, *His Solicitor*.

Certificate of Counsel.

I hereby certify that I am solicitor and of counsel for the defendant in the above-entitled cause, and that in my opinion the foregoing demurrer of David E. Thompson to the bill of complaint of Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, complainant, is well founded in point of law and proper to be filed in the above cause.

CHAS. E. MAGOON,
Solicitor and of Counsel for Defendant.

9 *Verification.*

UNITED STATES OF AMERICA, }
District of Nebraska, } *ss:*

David E. Thompson, being duly sworn, deposes and says that the foregoing demurrer is not interposed to delay the cause or any proceedings therein.

DAVID E. THOMPSON.

Subscribed and sworn to before me this 16th day of July, 1898.
[SEAL.] J. K. HONEYWELL,
Notary Public.

Indorsed: Filed Jul- 18, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit: on the 17th day of October, 1898, motion substituting Jno. W. McDonald as plaintiff was filed in said case, which said motion is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Complainant,
vs.
DAVID E. THOMPSON, Respondent. } 204, "T."

To the Hon. W. H. Munger, judge of the circuit court of the United States:

You are respectfully given to understand and be informed that Kent K. Hayden, complainant in the above-entitled action, as receiver of the Capital National Bank of Lincoln, died on the 12th day of July, 1898, and that John W. McDonald has been appointed and commissioned as his successor in office as receiver of the Capital National Bank of Lincoln, and has qualified and entered upon the duties of the said office and taken possession of the said trust and is now the duly authorized and qualified receiver of the Capital National Bank of Lincoln and is now actually engaged in winding up the affairs of said bank.

Wherefore, the solicitors of said Capital National Bank of Lincoln, Messrs. Cobb & Harvey and John H. Ames, move the court now for an order that the said John W. McDonald be substituted as complainant in the above entitled action and that the said action
10 be prosecuted hereafter in the name and title of John W. McDonald, receiver of the Capital National Bank of Lincoln, complainant, against David E. Thompson, respondent.

COBB & HARVEY AND
JOHN H. AMES,
Solicitors of Capital National Bank of Lincoln.

Indorsed: Filed Oct. 17, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit: at the October, 1898, term of said court, and on the 17th day of October, 1898, the following order was signed and filed in said case, and duly entered of record in the journal of the proceedings of said court had on said day, to wit:

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Complainant,
vs.
DAVID E. THOMPSON, Respondent. } 204, "T."

Now, on this 17th day of October, 1898, being one of the days of the regular October, 1898, term of said court, the court being informed that Kent K. Hayden, complainant in said case, is dead, and that John W. McDonald has been regularly appointed and qualified as receiver of the Capital National Bank of Lincoln as successor of Kent K. Hayden, and that said John W. McDonald has entered upon the performance of the duties of his said trust and is now engaged in winding up the affairs of said bank.

It is therefore ordered that John W. McDonald be substituted as

complainant in the above-entitled cause and that said cause shall be hereafter prosecuted in the name and title of John W. McDonald, receiver of the Capital National Bank of Lincoln, complainant, *vs.* David E. Thompson, respondent.

By the court:

W. H. MUNGER.

Indorsed: Filed Oct. 17, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, at the November, 1898, term of said court, and on the 16th day of November, 1898, the following proceedings were had and done in said case, as appears of record in the journal of the proceedings of said court had on said day, to wit:

KENT K. HAYDEN, Receiver,
vs.
DAVID E. THOMPSON. } 204, "T."

The demurrer to the bill herein coming on to be heard, the same is fully argued by the solicitors for the respective parties, duly submitted and by the court taken under advisement.

11 Thereupon afterwards, to wit: at the November 1898 term of said court, and on the 14th day of January, 1899, the following proceedings were had and done in said case, as appear of record on the journal of the proceedings of said court had on said day, to wit:

KENT K. HAYDEN, Receiver,
vs.
DAVID E. THOMPSON. } 204, "T."

Defendant's demurrer to the bill herein, having been heretofore fully argued, duly submitted and by the court taken under advisement, now after due consideration thereof, and being fully advised in the premises, it is—

Ordered by the court that said demurrer be and it hereby is sustained, and plaintiff (—) and hereby is given twenty (20) days from and after this date within which to elect as to whether or not he will stand upon the present bill or replead.

Thereupon afterwards, to wit: at the January 1899 term of said court, and on the 23rd day of January, 1899, the following proceedings were had and done in said case, as appear of record in the journal of the proceedings of said court had on said day, to wit:

KENT K. HAYDEN, Receiver,
vs.
DAVID E. THOMPSON. } 204, "T."

Upon motion of Cobb & Harvey, solicitors for the complainant, it is ordered that leave be, and the same hereby is, granted the plaintiff to file an amended bill herein instanter, which is accordingly done.

Thereupon afterwards, to wit, on the 23rd day of January, 1899, amended bill was filed in said case, which said amended bill is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JOHN W. MCDONALD, Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant,
vs.
DAVID E. THOMPSON, Respondent.
} Amended Bill.

To the judges of the circuit court for the district of Nebraska:

John W. McDonald, receiver of the Capital National Bank of Lincoln, Nebraska, brings this, his amended bill, against David E. Thompson, and thereupon your orator says:

That the said Capital National Bank of Lincoln, Nebraska, is a banking association organized and lately doing business under
12 and by virtue of the laws of the United States, located within the State and district of Nebraska.

That said David E. Thompson is a resident of the city of Lincoln, and a resident and citizen of the State of Nebraska.

That on or about the 23rd day of January, 1893, the said Capital National Bank of Lincoln failed, and became and was insolvent, and the Comptroller of the Currency of the United States became and was satisfied of the insolvency of the said Capital National Banking Association; that thereupon, on or about the 6th day of February, 1893, after the examination of the affairs of the said association, the said comptroller appointed one John D. MacFarland, receiver of said Capital National Bank of Lincoln; that said John D. MacFarland qualified as such receiver, entered upon the duties of said office, took possession of said bank, its books, records, and assets, and proceeded to close up the said association; that on or about the 4th day of May, of the year last aforesaid, the said John D. MacFarland resigned his said office of receiver of said bank, which said resignation was duly accepted by the said comptroller; that thereupon and afterwards Kent K. Hayden was duly appointed receiver of the said Capital National Bank of Lincoln, by the said Comptroller of the Currency, to succeed the said John D. MacFarland; that on or about the 31st day of May, 1893, said Hayden having been duly appointed as aforesaid, duly qualified as such receiver of Capital National Bank of Lincoln, entered upon the duties of said office, took possession of said bank, its books, records and assets, and proceeded to close up said association, and to wind up the affairs of said bank, and among other official acts commenced this action, by authority of the Comptroller of the Currency; but on the 8th day of July, 1898, said Kent K. Hayden died, and your orator has since been appointed his successor, and is now the duly appointed and qualified receiver of said bank, and is now winding up the affairs of said bank.

Your orator further alleges that on or about the 10th day of June,

1893, the Comptroller of the Currency of the United States, at the city of Washington, in the District of Columbia, made, issued, declared, signed, sealed with the seal of his office, and published his order and proclamation of that date, in and by which he declared that:

Whereas, upon a proper accounting by the receiver theretofore appointed to collect the assets of the Capital National Bank of Lincoln, Nebraska, and upon a valuation of the uncollected assets remaining in his hands, it did appear to the satisfaction of said comp-
13 troller that in order to pay the debts of said association, it is necessary to enforce the individual liability of the stockholders therefor, to the extent thereinafter mentioned, as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States; that thereupon, by virtue of the authority in him vested by law, he did thereby make assessment and requisition upon the shareholders of the said Capital National Bank of Lincoln, for three hundred thousand dollars, to be paid by them ratably on or before the 10th day of July, 1893; and that he did thereby make demand upon each and every share of the capital stock of said association held or owned by them respectively, at the time of its failure, and thereby directed Kent K. Hayden, former receiver by the name and designation of K. K. Hayden, the receiver theretofore appointed, to take all necessary proceedings by suit or otherwise, to enforce to that extent the individual liability of the said shareholders: and has since directed your orator in all things to carry out said duties and instructions.

Your orator further represents to your honors that on the 23rd day of April, 1891, and for a long time previous thereto, the said respondent, David E. Thompson, was the owner of, and had standing in his name, two hundred and ten shares of the capital stock of the said Capital National Bank of Lincoln, upon the books of said association, and that upon and for a long time previous to the said last-mentioned date the said defendant, David E. Thompson, was a director of the said Capital national bank; that said shares were created as a part of the original issue of the capital stock of said bank at the time the said Thompson became the owner thereof, and the same, nor any of them, did not come into his possession or ownership by purchase, transfer or assignment but that he acquired the same as upon subscription to such capital stock, which fact was and is evidenced by the fact that at that time certificates of said shares, partly printed and partly written, and duly signed by the president and cashier, and sealed with the corporate seal of said bank, were issued and delivered to said Thompson, and with his knowledge and consent registered on the books of said bank as belonging to him, and at which time the said Thompson in writing duly receipted for said shares and certificates to said bank, and in writing upon the books of said bank declared himself to be the owner thereof, and of all the same.

That on the 23rd day of April, 1891, and for a long time prior thereto, and thereafter, until said bank closed its doors, the said Capital National Bank of Lincoln was in a failing condition, and

was in fact insolvent, which was known to said David E. Thompson personally, as well as officially, in his capacity as such director.

14 Your orator further represents to your honors that the said David E. Thompson, respondent herein, being fully advised of and knowing the failing condition and insolvency of the said bank, and in expectation and anticipation of the early and near approaching failure of the said bank, and the necessary enforcement of his liability as a shareholder, and to defraud the said bank, its depositors and creditors out of the security afforded by the law upon the shareholders of national banks, and to render it impossible in the case of the failure of said bank, which the said respondent believed and had reason to believe was imminent, and could not be long delayed, to place it out of the power of the Comptroller of the Currency to enforce the contingent liability of him, the said respondent David E. Thompson, to contribute not to exceed one hundred cents on the dollar of the par value of the shares of stock owned and held by him as hereinbefore stated, in case of the failure of said bank and its inability to pay its depositors and other creditors out of the ordinary resources, and without resorting to an assessment upon its capital stock in the hands of its shareholders, and for the purpose of avoiding such liability and cheating, wronging and defrauding the said bank, its depositors and creditors, the Comptroller of the Currency and the receiver of the said bank, of their lawful rights and remedies in the premises, did, on or about the 14th day of November, 1891, sell and cause to be transferred on the books of the said bank, by proceedings regular in form, but not made in good faith, one hundred and eighty-five shares of the said capital stock of the Capital National Bank of Lincoln, Nebraska, so acquired, owned and held by him as aforesaid, to Charles W. Mosher, and Richard C. Outcalt, whom your orator has been informed and believes, and so charges upon information and belief, are, and were at the date last aforesaid, pecuniarily irresponsible persons, of or from whom the amount of such assessment of one hundred dollars upon each share of the capital stock so owned and held by said respondent, David E. Thompson, cannot be made by legal process or otherwise. Your orator further avers that the said David E. Thompson, being fully advised of and knowing the failing condition and insolvency of the said bank, and in expectation and anticipation of the early and near approaching failure of the said bank and its inability to pay its depositors and other creditors out of the ordinary resources and without resorting to an assessment of the capital stock in the hands of its shareholders, and for the purpose of avoiding such liability and cheating, wronging and defrauding the said bank, its depositors and creditors, the Comptroller of the Currency and the receiver of the said bank, of their lawful rights and remedies in the premises, did, on or

15 about the 23rd day of April, 1891 (but the records of said bank erroneously show said sale was made December 10, 1890) sell and caused to be transferred on the books of said bank, by proceedings legal in form, but not made in good faith, thirty

shares of the said capital stock of the Capital National Bank of Lincoln, Nebraska, so acquired, owned, and held by him as aforesaid, to Esther C. Barton, whom your orator has upon information and belief, and so charges upon information and belief, is and was at the date last aforesaid, not a pecuniarily responsible person, of or from whom the amount of such assessment of one hundred dollars upon each share of the capital stock so owned and held by said respondent David E. Thompson, cannot be made by legal process, or otherwise.

So that your orator, by reason of the sale and transfer of the said shares of stock by and from the said respondent, David E. Thompson, to the said respondents Charles W. Mosher, Richard C. Outcalt, Esther C. Barton, and the insolvency of the said transferees, and their pecuniary inability to respond in damages as hereinbefore stated and set forth, your orator is deprived of his remedy at law for the collection of so much of the assessment of three hundred thousand dollars made upon the capital stock of the said Capital national bank as is applicable to the shares thereof owned and otherwise held by said respondent, David E. Thompson; all of which actions and doings of the said respondent are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator in the premises.

In tender consideration whereof, and forasmuch as your orator is entirely remediless by the strict rules of the common law, and can only have relief in a court of equity where matters of this kind are properly cognizable, to the end therefore that the said David E. Thompson, respondent herein, may full, true, direct answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly as though the same were hereinafter repeated, and they thereunto distinctly interrogated, but the answer in or under oath of the said respondents is hereby waived.

And the complainant prays that upon consideration thereof, your honors find that the said respondent, David E. Thompson, is justly liable for the payment of the assessment heretofore made on said stock, as though he had not paid the same, and was still the true and lawful owner of the said shares of the capital stock of the Capital national bank hereinbefore mentioned, and that the transfer of the said shares of stock by the said David E. Thompson, to the said Charles W. Mosher, Richard C. Outcalt and Esther C. Barton,
16 be adjudged by this court as not affecting or diminishing the liability of defendant, and that it may adjudge and decree that he pay to your orator the assessment thereon made by the Comptroller of the Currency as hereinbefore stated, to the sum and amount of $21,000.00, together with lawful interest on said sum from July 10, 1893, together with costs of this action and a reasonable solicitor's fee for its conduct and prosecution; and that your orator may have such other and further relief in the premises as may be agreeable to equity and good conscience.

May it please your honors to grant unto your orator a writ of subpœna, issuing out of this honorable court in equity, to be directed to the said David E. Thompson, thereby commanding him, under a

certain penalty therein to be specified, to be and appear personally before your honors on a certain day, then and there to answer all and singular the premises, and to stand to and perform and abide by such order and decree therein as to your honors shall seem meet.

And your orator will ever pray.

A. E. HARVEY,
Solicitor for Complainant.
JOHN H. AMES, *Of Counsel.*

Indorsed: Filed Jan. 23, 1899. Oscar B. Hillis, clerk.

Thereupon, afterwards, to wit, on the 7th day of February, 1899, demurrer to amended bill was filed in said case, which said demurrer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JOHN W. MCDONALD, Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant,
vs.
DAVID E. THOMPSON, Respondent.
} 204, "T." In Chancery.

The demurrer of David E. Thompson, respondent, to the amended bill of complaint of John W. McDonald, receiver of the Capital National Bank of Lincoln, Nebraska, the above-named complainant.

This defendant by protestation not confessing any or all of the matters and things in the plaintiff's bill of complaint to be true, in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth:

1. That the complainant hath not in and (for) his said amended bill made or stated such a case as entitled him, in a court of
17 equity, to any discovery from this defendant, or to any relief against him, as to the matters contained in said bill, or any of such matters.

2. That it appears by the said amended bill that Charles W. Mosher, Richard C. Outcalt and Esther C. Barton, mentioned and described in said amended bill, as transferees of the certain two hundred and ten shares of the capital stock of the Capital national bank alleged to have been previously held by defendant, and each of them, are necessary parties defendant, without whom no relief can be had in equity against said alleged transfer, and that there is therefore a defect of parties defendant to said amended bill.

3. That the complainant is not entitled upon said amended bill to the relief he prays for, because he had a plain and adequate remedy at law.

4. That the complainant is not entitled upon said amended bill to the relief he prays for, because it appears by the said amended bill that the cause of action therein set forth and by complainant

sought to be enforced against defendant, accrued more than four years prior to commencement of suit, and is therefore barred by the statute of limitations.

Wherefore, and for divers other good causes of demurrer appearing in said amended bill, the defendant doth demur thereto, and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said amended bill; and prays to be hence dismissed with his costs and charges, in this behalf most wrongfully sustained.

DAVID E. THOMPSON, *Respondent,*
By CHAS. E. MAGOON,
HALLECK F. ROSE, *His Solicitors.*

Certificate of Counsel.

I hereby certify that I am solicitor and counsel for the respondent in the above-entitled cause, and that in my opinion the foregoing demurrer of David E. Thompson to the amended bill of complaint of John W. McDonald, receiver of the Capital National Bank of Lincoln, Nebraska, complainant, is well founded in point of law, and proper to be filed in the above cause.

HALLECK F. ROSE,
Solicitor and Counsel for Respondent.

18 *Verification.*

UNITED STATES OF AMERICA, }
State and District of Nebraska, Lancaster County. }

David E. Thompson being duly sworn, deposes and says that the foregoing demurrer is not interposed to delay the cause or any proceedings therein.

DAVID E. THOMPSON.

Subscribed in my presence and sworn to before me this 6th day of February, 1899.

[SEAL.] J. K. HONEYWELL,
Notary Public.

Indorsed: Filed Feb. 7, 1899. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit: at the January 1899 term of said court, and on the 28th day of February, 1899, the following proceedings were had and done in said case, as appear of record upon the journal of the proceedings of said court had on said day, to wit:

KENT K. HAYDEN, Receiver of Capital National Bank, Lincoln,
vs.
DAVID E. THOMPSON. } 204, "T."

This day come the parties herein by their respective solicitors and submit to the court a demurrer to the amended bill.

Thereupon afterwards, to wit: at the regular November 1898 term of said court, and on the 4th day of April, 1899, the following proceedings were had and done in said case, as appear of record on the journal of the proceedings of said court had on said day, to wit:

K. K. HAYDEN, Receiver,
vs.
DAVID E. THOMPSON. } 204, "T."

The demurred to the amended bill, having been heretofore fully argued by the attorneys for the respective parties, duly submitted and by the court taken under advisement; now, after due consideration thereof, and being fully advised concerning the same, it is hereby—

Ordered by the court that said demurrer be, and it hereby is, sustained; and it is considered, ordered, adjudged and decreed, that the complainant's bill be, and it hereby is, dismissed, and the defendant do have and recover of and from the complainant, his costs and disbursements herein to be taxed and that he have execution therefor.

Thereupon afterwards, to wit: on the 5th day of April, bill of costs was filed in said case, which bill of costs is in words and figures following, to wit:

19 In the Circuit Court of the United States for the District of Nebraska.

Bill of Costs Taxed in Favor of the Defendant in the Case of Kent K. Hayden, Rec., vs. David E. Thompson, No. 204, "T."

Clerk's fees (for items see appearance docket)	$6.00
Attorney's fees—*i. e.*, docket fee $20.00	20.00
Total	$26.00

UNITED STATES OF AMERICA,
District of Nebraska, } *ss:*

I, Oscar B. Hillis, clerk of the circuit court of the United States for said district of Nebraska, do hereby certify that the above and foregoing is a true statement of the costs taxed and allowed in favor of defendant in the above-entitled case, and that the same are just and legal as I verily believe.

Witness my hand and the seal of said court this 5th day of April, 1899.

[SEAL.]

OSCAR B. HILLIS, *Clerk,*
By R. C. HOYT, *Deputy.*

Indorsed: Filed Apr. 5, 1899. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 27th day of September, 1899, a petition for an allowance of appeal and assignment of error was filed in said case, which said petition and assignment is in words and figures following, to wit:

In the Circuit Court of the United States within and for the District of Nebraska.

JOHN W. McDONALD, Receiver of the Sapital National Bank of Lincoln,
against
DAVID E. THOMPSON.

Petition for an Allowance of Appeal and Assignment of Error.

Your petitioner, the complainant in the above-entitled cause, by direction of the Comptroller of the Currency would respectfully represent and show that in the above-entitled case pending in the United States circuit court in and for the district of Nebraska, 8th circuit, there was entered on the 4th day of April, 1899, of said court a final decree greatly to the prejudice and injury of your petitioners, which said decree is erroneous and inequitable in many particulars.

20 Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained, your petitioner prays that he may be allowed an appeal in said case to the United States circuit court of appeals, and that the proper orders may be made. Your petitioner shows he is an officer of the United States and under section 1001 of the Revised Statutes of the United States not required to give bond upon appeal or security for costs in this case.

Your petitioner makes the following assignment of errors:

First. The court erred in sustaining the demurrer of the respondent.

Second. The court erred in deciding that this complainant did not have the right to maintain this action against the respondent.

Third. The court erred in dismissing the complainant's said action.

Fourth. The court erred in entering judgment in favor of the respondent and against the complainant.

Dated September 27, 1899.

JOHN H. AMES,
A. E. HARVEY,
Attorneys for Complainant.

Appeal allowed.
W. H. MUNGER, *Judge.*

Indorsed: Filed Sep. 27, 1899. Oscar B. Hillis, clerk, by R. C. Hoyt, deputy.

Thereupon, afterwards, to wit, on the 27th day of September, 1899, a citation was duly signed in said case, and returned and filed on the 29th day of September, 1899, with proof of service endorsed thereon the following of which is the original:

The United States of America to David E. Thompson, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein, John W. McDonald, receiver of the Capital National Bank of Lincoln, Nebraska, is appellant, and you are appellee to show cause, if any there be, why the judgment
21 rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William H. Munger, judge of the circuit court of the United States for the district of Nebraska, this 27th day of September, in the year of our Lord one thousand eight hundred and ninety-nine.

WM. H. MUNGER,
United States District Judge for the District of Nebraska.

STATE OF NEBRASKA, } ss:
Lancaster County, }

Andrew E. Harvey, being by me first duly sworn, says that at Lincoln, Nebraska, on the 28th day of September, 1899, he served the within citation upon Halleck F. Rose, one of the solicitors of record for the respondent Thompson in the within entitled cause by delivering to and leaving with the said Rose, personally, a true and correct copy of the same.

ANDREW E. HARVEY.

Subscribed in my presence and sworn to before me this 28th day of September, A. D. 1899.

[NOTARIAL SEAL.] EDWIN CAMACK,
Notary Public.

No. 204, "T." United States circuit court, district of Nebraska. John W. McDonald *vs.* David E. Thompson. Citation. Filed Sep. 29, 1899. Oscar B. Hillis, clerk, by R. C. Hoyt, deputy clerk.

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Oscar B. Hillis, by R. C. Hoyt, deputy clerk of the circuit court of the United States for the district of Nebraska, do hereby certify that the foregoing pages from one (1) to thirty-seven (37) inclusive, contain true and faithful transcripts of all the pleadings, process and proceedings of record and on file in said court, in the

case of John W. McDonald, receiver of the Capital National Bank of Lincoln *vs.* David E. Thompson, No. 204 "T," and that a copy of the citation duly certified has been lodged and remains in my said office as such clerk.

Witness my hand and seal of said circuit court of Omaha, in said district, this 29th day of September, A. D. 1899.

Seal United States Circuit Court, District of Nebraska.

OSCAR B. HILLIS, *Clerk*,
By R. C. HOYT, *Deputy*.

[Cancelled 10c. U. S. rev. stamp.]

Filed Sep. 30, 1899.

JOHN D. JORDAN, *Clerk*.

22 (*Appearance for Appellant.*)

And on the thirtieth day of September, A. D. 1899, an appearance of counsel for the appellant was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

JOHN W. McDONALD, Receiver of the Capital National Bank of Lincoln, Appellant,
vs.
DAVID E. THOMPSON. } No. 1335.

The clerk will enter my appearance as counsel for the appellant.

JOHN H. AMES.
ANDREW E. HARVEY.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, May term, 1899. No. 1335. John W. McDonald, receiver, &c., appellant, *vs.* David E. Thompson. Appearance. Filed Sept. 30, 1899. John D. Jordan, clerk. John H. Ames, Andrew E. Harvey, counsel for appellant.

(*Appearance for Appellee.*)

And on the thirtieth day of October, A. D. 1899, an appearance of counsel for the appellee was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

JOHN W. McDONALD, Receiver of the Capital National Bank of Lincoln, Neb., Appellant,
vs.
DAVID E. THOMPSON. } No. 1335.

The clerk will enter my appearance as counsel for the appellee.

CHARLES E. MAGOON.
HALLECK F. ROSE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, May term, 1899. No. 1335. John W. McDonald, receiver, &c., appellant, *vs.* David E. Thompson. Appearance. Filed Oct. 30, 1899. John D. Jordan, clerk. Chas. E. Magoon, Halleck F. Rose, counsel for appellee.

23 (*Submission.*)

And on the twenty-fifth day of January, A. D. 1900, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

THURSDAY, *January* 25, 1900.

JOHN W. McDONALD, Receiver of the Capital National Bank of Lincoln, Appellant,
vs.
DAVID E. THOMPSON. } No. 1335.

Appeal from the circuit court of the United States for the district of Nebraska.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Andrew E. Harvey in behalf of the appellant, continued by Mr. Halleck F. Rose for the appellee, and concluded by Mr. Andrew E. Harvey for the appellant.

Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twenty-first day of March, A. D. 1900, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

24 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1899.

JOHN W. McDONALD, Receiver of the Capital National Bank of Lincoln, Nebraska, Appellant,
vs.
DAVID E. THOMPSON, Appellee. } No. 1335. Appeal from the Circuit Court of the United States for the District of Nebraska.

Mr. Andrew C. Harvey (Mr. John H. Ames was with him on the brief) for appellant.

Mr. Halleck F. Rose for appellee.

Before Caldwell, Sanborn, and Thayer, circuit judges.

On the 23d day of January, 1893, the Capital National Bank of Lincoln, Nebraska, failed, and on the 6th day of February, 1893, the

Comptroller of the Currency appointed a receiver for the same. On the 10th day of June, 1893, the Comptroller ordered an assessment on the stockholders of the bank to the amount of the par value of the shares payable July 10, 1893. This suit in equity was brought on the 20th day of May, 1898, by Kent K. Hayden as receiver of the bank, the predecessor in office of the present receiver and appellant, against David E. Thompson the appellee, as a shareholder in the bank, to recover the amount assessed upon his stock by the order of the Comptroller of the Currency. The bill alleged the defendant had, in anticipation of the failure of the bank, fraudulently transferred his shares to persons financially irresponsible for the purpose of escaping his liability as a stockholder. The defendant demurred to the bill and to an amended bill upon the ground among others, that the cause of action was barred by the statute of limitations of the State of Nebraska. The court sustained the demurrer and dismissed the bill, and thereupon the receiver brought the case by appeal to this court.

CALDWELL, circuit judge, after stating the case as above, delivered the opinion of the court:

The demurrer raises several questions, but it is unnecessary to pass on any other than that based on the plea of the statute of limitations. The provisions of the Nebraska statute of limitations applicable to the case read as follows:

25 "SECTION 5. Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued.

"SECTION 11. Within four years an action upon a contract not in writing express or implied; an action upon a liability created by statute other than a forfeiture or penalty." Compiled Statutes of Nebraska.

Whether the liability of a stockholder is treated as an express or implied contract not in writing or as a liability created by statute—and confessedly it is one or the other—an action founded thereon, whether at law or in equity, is barred under the Nebraska statute in four years. Carroll *v.* Green, 92 U. S., 509; Terry *v.* McLure, 103 U. S., 442; Campbell *v.* Haverhill, 155 U. S., 610; Thompson *v.* German Ins. Co., 76 Fed., 892; Butler *v.* Poole, 44 Fed., 586; Van Pelt *v.* Gardner, 54 Neb., 701, 705; Glenn *v.* Marbury, 145 U. S., 499.

In this case the cause of action accrued on the 10th day of July, 1893, the day fixed by the Comptroller of the Currency for the payment of the assessment, and suit was not brought until the 20th day of May, 1898, more than four years after the cause of action accrued.

The circuit court rightly decided that upon the face of the bill the cause of action was barred, and its decree dismissing the bill is affirmed.

Filed March 21, 1900.

26 (*Decree.*)

And on the twenty-first day of March, A. D. 1900, in the record of the proceedings of said circuit court of appeals is a decree in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

WEDNESDAY, *March* 21, 1900.

JOHN W. McDONALD, Receiver of the Capital National Bank of Lincoln, Nebraska, Appellant,
vs.
DAVID E. THOMPSON. } No. 1335.

Appeal from the circuit court of the United States for the district of Nebraska.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Nebraska and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that David E. Thompson have and recover against John W. McDonald, receiver of the Capital National Bank of Lincoln, Nebraska, the sum of twenty dollars for his costs herein and have execution therefor.

March 21, 1900.

(*Petition for Appeal and Assignment of Errors.*)

And on the sixth day of June, A. D. 1900, a petition for appeal and assignment of errors was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the 8th Circuit.

JOHN W. McDONALD, Receiver of the Capital National Bank of Lincoln, Nebraska, Appellant,
against
DAVID E. THOMPSON, Appellee.

Petition for the Allowance of an Appeal to the United States Supreme Court.

27 To the honorable the judges of the said court:

The above-named appellant, complainant in the court below, by the direction and pursuant to the instruction of the Comptroller of the Currency of the United States, prays your honors to grant him an appeal to the Supreme Court of the United States from the judg-

ment of the court in the above-entitled case, rendered on the — day of ——, A. D. 1900, affirming the judgment therein of the United States circuit court for the district of Nebraska, by which last-mentioned judgment the bill of complaint of the appellant was dismissed and the appellant adjudged to pay the costs of this suit.

And as reasons for and for the purposes of said appeal your petitioner, John W. McDonald, appellant and complainant aforesaid, by his solicitors, John H. Ames and Andrew E. Harvey, now here makes and assigns the following assignments of errors, prejudicial to him, which he alleges to have intervened in and to be disclosed by the records, proceedings, and judgment in said cause in this court:

First.

This court erred in affirming the judgment of the circuit court sustaining the demurrer of the respondent to your petitioner's amended bill of complaint and dismissing said amended bill and adjudging that your petitioner pay the costs in said suit.

Second.

This court erred in affirming the judgment of the circuit court by which it was decided that your petitioner was not entitled to have or maintain his said amended bill of complaint.

Third.

This court erred in holding and deciding that your petitioner's amended bill of complaint is founded upon either a statutory liability or obligation or upon an implied contract or upon an express contract not in writing.

Fourth.

This court erred in holding and deciding that your petitioner's amended bill of complaint or the cause of action set forth therein is or was at the time of the beginning of this action barred by the statute of limitations of the State of Nebraska.

28 Wherefore *m*our petitioner prays an appeal, as aforesaid, to the Supreme Court of the United States, and respectfully suggests to your honors that he is an officer of the United States, and as such exempted by section 1001 of the Revised Statutes of the United States from giving a bond upon appeal or for security for costs in this suit.

JOHN W. McDONALD,
By JOHN H. AMES AND
ANDREW E. HARVEY,
His Solicitors.

(Endorsed:) No. 1335. In the United States circuit court of appeals for the 8th circuit. John W. McDonald, receiver of the Capital National Bank of Lincoln, Nebraska, appellant, against David E.

Thompson, appellee. Petition for appeal and assignment of errors. Filed Jun- 6, 1900. John D. Jordan, clerk. John H. Ames & Andrew E. Harvey, att'ys for appellant.

(*Order Allowing Appeal.*)

And on the sixth day of June, A. D. 1900, in the record of the proceedings of said circuit court of appeals is an order allowing an appeal in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

WEDNESDAY, *June* 6, 1900.

JOHN W. McDONALD, Receiver of the Capital National Bank of Lincoln, Nebraska, Appellant,
vs.
DAVID E. THOMPSON. } No. 1335.

Appeal from the circuit court of the United States for the district of Nebraska.

This cause came on to be heard upon the petition of counsel for the appellant for an order allowing an appeal to the Supreme Court of the United States from the decree of this court entered in said cause on the 21st day of March, 1900.

On consideration whereof it is now here ordered by this court that said appeal be, and the same is hereby, allowed, as prayed for in said petition.

29 (*Citation.*)

And on the ninth day of June, A. D. 1900, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with the proof of service endorsed thereon, is hereto attached and herewith returned.

30 The United States of America to David E. Thompson, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein John W. McDonald, receiver of the Capital National Bank of Lincoln, Nebraska, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Amos M. Thayer, judge of the United

States circuit court of appeals for the eighth circuit, this sixth day of June, in the year of our Lord one thousand nine hundred.

AMOS M. THAYER,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] No. 1335. Supreme Court of the United States. John W. McDonald, as receiver, etc., appellant, *vs.* David E. Thompson. Citation on appeal. Filed Jun- 9, 1900. John D. Jordan, clerk.

STATE OF NEBRASKA, }
Lancaster County, } *ss:*

Andrew E. Harvey, being by me first duly sworn, says that at Lincoln, Nebraska, on the seventh day of June, A. D. 1900, he served the within citation upon Halleck F. Rose, Esq., one of the solicitors of record for the respondent, David E. Thompson, in the within entitled cause, by delivering to and leaving with the said Halleck F. Rose personally, in his law office in said city, a true and correct copy of this citation.

ANDREW E. HARVEY.

Subscribed in my presence and sworn to before me this seventh day of June, A. D. 1900.

{ Notarial Seal of S. L. Geisthardt, Lincoln, Lancaster County, Nebraska. }

S. L. GEISTHARDT,
Notary Public.

Commission expires Sept. 11, 1905.

31 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing thirty pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of John W. McDonald, receiver of the Capital National Bank of Lincoln, Nebraska, appellant, *vs.* David E. Thompson, appellee, No. 1335, December term, 1899, as fully as the same remain of record and on file in my office. I do further certify that the original citation with the proof of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the nineteenth day of May, A. D. 1900, a mandate was issued out of the clerk's office of said circuit court of appeals directed to the judges of the circuit court of the United States for the district of Nebraska, in accordance with the decree of said circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the eighth

circuit, at the city of St. Louis, Missouri, this nineteenth day of June, A. D. 1900.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No., 17,814. U. S. C. C. of appeals, 8th circuit. Term No., 95. John W. McDonald, receiver of the Capital National Bank of Lincoln, Nebraska, appellant, *vs.* David E. Thompson. Filed June 26, 1900.

No. 95.

FILED
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JAMES H. McKENNEY

Bf. of Ames & Harvey for Apt

IN THE SUPREME COURT OF THE UNITED STATES.

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JOHN W. McDONALD, Receiver of the Capital National Bank of Lincoln, Nebraska.
Appellant

vs

DAVID E. THOMPSON.
Appellee

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Brief for Appellant.

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BRIEF FOR APPELLANT.

This was originally an appeal to the United States Circuit Court of Appeals, eighth circuit, from a decree of the United States circuit court for the district of Nebraska, sustaining a demurrer by the appellee to the bill of complaint of the appellant and dismissing the bill with costs.

The amended bill alleged, in substance, that the Capital National Bank failed on the 23d day of January, 1893; that thereafter appellant was appointed receiver of the bank by the comptroller and was then engaged in winding up its affairs; that on the 10th day of June, 1893, the comptroller of currency made and published an order assessing the stockholders of the bank to the amount of the

par value of the shares, payable July 10, 1893, for the purpose of paying the depositors and creditors, in accordance with sections 5151 and 5234 R.S. U.S.; that "on the 23d day of April, 1891, and for a long time previous thereto, the said respondent, David E. Thompson, was the owner of, and had standing in his name, two hundred and ten shares of the capital stock of the said Capital National Bank of Lincoln, upon the books of said association, and that upon and for a long time previous to the said last mentioned date the said defendant, David E. Thompson was a director of the said Capital National Bank; that said shares were created as a part of the original issue of the capital stock of said bank at the time the said Thompson became the owner thereof, and the same, nor any of them, did not come into his possession or ownership by purchase, transfer, or assignment, but that he acquired the same as upon subscription to such capital stock, which fact was and is evidenced by the fact that at that time certificates of said shares, partly printed and partly written, and duly signed by the president and cashier, and sealed with the corporate seal of said bank, were issued and delivered to said Thompson, and with his knowledge and consent registered on the books of said bank as belonging to him, and at which time the said Thompson in writing duly receipted for said shares and certificates to said bank, and in writing upon the books of said bank declare himself to be the owner thereof, and of all the same,

"That on the 23d day of April, 1891, and for a long time prior thereto, and thereafter, until said bank closed its doors, the said Capital National Bank of Lincoln was

in a failing condition, and was in fact insolvent, which was known to said David E. Thompson personally, as well as officially, in his capacity as such director.

That the said David E. Thompson, respondent herein, being fully advised of and knowing the failing condition and insolvency of the said bank, and in expectation and anticipation of the early and near approaching failure of the said bank, and the necessary enforcement of his liability as a shareholder, and to defraud the said bank, its depositors and creditors out of the security afforded by the law upon the shareholders of nationl banks and to render it impossible in the case of the failure of said bank, which the said respondent believed and had reason to believe was imminent, and could not be long delayed, to place it out of the power of the comptroller of the currency to enforce the contingent liability of him, the said respond- David E. Thompson, to contribute not to exceed one hundred cents on the dollar of the par value of the shares of stock owned, and held by him as hereinbefore stated, in case of the failure of said bank and its inability to pay its depositors and other creditors out of the ordinary resources, and without resorting to an assessment upon its capital stock in the hands of its shareholders, and for the purpose of avoiding such liability and cheating, wronging and defrauding the said bank, its depositors and creditors, the comptroller of the currency, and the receiver of the said bank, of their lawful rights and remedies in the premises, did, on or about the 14th day of November, 1891, sell and cause to be transferred on the books of the said bank, by proceedings regular in form, but not made in good faith, one hundred and eighty-five shares of the

said capital stock of the Capital National Bank of Lincoln, Nebraska, so acquired, owned and held by him as aforesaid, to Charles W. Mosher and Richard C. Outcalt, whom the complainant has been informed and believes, and, so charges upon information and belief, are, and were at the date last aforesaid, pecuniarily irresponsible persons of or from whom the amount of such assessement of one hundred dollars upon each share of the capital stock so owned and held by said respondent, David E. Thompson, cannot be made by legal process or otherwise. Your orator further avers that the said David E. Thompson being fully advised of and knowing the failing condition and insolvency of the said bank and in expectation and anticipation of the early and near approaching failure of the said bank and its inability to pay its depositors and other creditors out of the ordinary resources and without resorting to an assessment of the capital stock in the hands of its shareholders, and for the purpose of avoiding such liability and cheating, wronging and defrauding the said bank, its depositors and creditors, the comptroller of the currency and the receiver of the said bank of their lawful rights and remedies in the premises did, on or about the 23d day of April, 1891 (but the records of said bank erroneously show said sale was made December 10, 1890), sell and caused to be transferred on the books of said bank, by proceedings legal in form, but not made in good faith, thirty shares of the said capital stock of the Capital National Bank of Lincoln, Nebraska, so acquired, owned and held by him as aforesaid, to Esther C. Barton, whom your orator has upon information and belief and so charges upon information and belief, is, and was at

the date last aforesaid, not a pecuniarily responsible person, of or from whom the amount of such assessment of one hundred dollars upon each share of the capital stock so owned and held by said respondent David E. Thompson cannot be made by legal process, or otherwise," and concluded with a prayer for a recovery from the appellee for an amount of the par value of the shares above mentioned.

To this amended bill the appellee appeared and filed a general demurrer for want of equity and specifically objecting that the action appeared upon the face of the bill to be barred by the statute of limitations of the state of Nebraska. On the 4th day of April, 1890, after argument by counsel the demurrer was sustained and a decree entered dismissing the bill with costs.

Thereafter, in due season, and upon application by the appellant, an appeal was allowed to the United States circuit court of appeals, eighth circuit upon the following assignments of error:

First. The court erred in sustaining the demurrer of the respondent.

Second. The court erred in deciding that this complainant did not have the right to maintain this action against the respondent.

Third. The court erred in dismissing the complainants said action.

Fourth. The court erred in entering judgment in favor of the respondent and against the complainant.

The case was argued and submitted to the United States Circuit Court of appeals at St Louis on January 25, 1900 and on the 21st day of March 1900, the said court rendered its judgment, affirming the decree of the circuit court.

On the 6th day of June, a petition for appeal and assignment of errors was filed in the clerks office of said circuit court of appeals, the assignment of errors being as follows:

FIRST.

The Court erred in affirming the judgment of the circuit court sustaining the demurrer of the respondent to your petitioner's amended bill of complaint and dismissing said amended bill and adjudging that your petitioner pay the costs in said suit.

SECOND.

This court erred in affirming the judgment of the circuit court by which it was decided that your petitioner was not entitled to have or maintain his amended bill of complaint.

THIRD.

This court erred in holding and deciding that your petitioner's amended bill of complaint is founded upon either, a statutory liability or obligation or upon an implied contract, or upon an express contract not in writing.

FOURTH.

This court erred in holding and deciding that your

petitioner's amended bill of complaint, or the cause of action set forth therein, is or was at the time of the beginning of this action barred by the statute of limitations of the state of Nebraska.

On the 6th day of June the said court made an order allowing the appeal prayed for, a citation was issued and duly served, and the complainant now appears in this court praying for reversal of the judgments of the courts below.

While the record does not indicate the fact, the sole ground upon which the circuit court sustained the demurrer to the bill, was that the action appeared to be barred by the statute of limitations. That this was also the ground upon which the circuit court of appeals based its judgment is apparent from the opinions rendered by that court, which opinions being exceedingly short, we copy herein omitting the court's statement of facts.

"The demurrer raises several questions but it is unnecessary to pass on any other than that based on the plea of the statute of limitations. The provisions of the Nebraska statute of limitations appplicably to the case read as follows:

Section 5. Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued.

"Section 11. Within four years an action upon a contract not in writing, express or implied, an action upon a liability created by statute other than a forfeiture or penalty. Compiled Statutes of Nebraska.

Whether the liability of a stockholder is treated as an express or implied contract not in writing or as a liability created by statute—and confessedly it is one or the other—an action founded thereon,

whether at law or in equity, is barred under the Nebraska statute in four years. Carroll v Green, 92 U. S. 509; Terry v McLure, 103 U. S. 442; Campbell v Haverhill, 155 U. S. 610; Thompson v German Insurance Co., 76 Fed. 892; Butler v Poole, 54 Fed 586; VanPelt v Gardner, 58 Neb 701. 705; Glenn v Marbury, 145. U. S. 499.

"In this case the cause of action accrued on the 10th day of July, 1893, the day fixed by the comptroller of the currency for the payment of the assessment, and suit was not brought until the 20th day of May, 1898, more than four years after the cause of action accrued."

"The circuit court rightly decided that upon the fact of the bill the cause of action was barred, and its decree dismissing the bill is affirmed."

Since the rendition of the above opinion the question whether the liability of the respondent is a statutory liability has been eliminated out of the points for further discussion by the decisions of this court in Whitman vs. Oxford National Bank, 176 U. S. page 559 and Matteson vs. Dent, 176 U. S. 521, where it is decided point blank that the liability of a stockholder as in this case, is a *contract* liability, and not a simple statutory liability, as was contended by counsel for the respondent in their oral and printed arguments in the courts below. It now remains for this court to determine whether the liability of the respondent, as well as the liability of all stockholders of national banks, depositors and creditors of such banks, aggregating in volume almost countless millions of dollars is dependant only upon an *implied* contract or at most, upon an express contract, not in writing, or whether as we contend, such liability is based upon contracts in writing, which furnish greater security for the creditors of such banks, and to escape from which is more difficult.

The learned Judge Caldwell declared in the opinion of the court, that the liability of respondent, was *confessedly* based either upon a contract not in writing, express or implied, or upon a statutory liability. This court has already held that it is not a statutory liability, and so much is not confessed assuredly, and we shall undertake to show that said liability is based upon a contract in writing, and that suits brought for its enforcement are governed by the provisions of section 10 of the Nebraska Code, which immediately precedes section 11, quoted in the opinion, and which reads as follows:

"Section 10. Within five years, an action upon a specialty, or any agreement, contract or promise in writing, or foreign judgment."

Before entering upon the discussion of this question, however, we desire to first present to this court the proposition, which we urged in the circuit court of appeals, that the liability of a stockholder in a national bank, to an assessment by the comptroller, does not become protected by the bar of the statute, until the debts of the bank, for the payment of which the assessment is made, have become barred. For the support of this proposition we beg leave to submit the following:

ARGUMENT.

The contract and liability of the defendant which is sought to be enforced in this action were not entered into between him and the bank, but between him and the creditors of the bank. The order of the comptroller for the enforcement of the individual liability of the shareholders

did not create a cause of action or start the statute of limitations running, nor in any way affect the existence, validity, or duration of the right which belongs to the creditors to have this liability enforced. This suit is not upon the defendant's contract of subscription to the capital stock of the bank nor upon his contract of shareholdership in that bank, but upon his contract as shareholder with the creditors of the bank, which was entered into at the same time by the bank and by himself and the other shareholders jointly, through the agency of the officers of the bank. How he became a shareholder, or whether that fact is proved orally or by writings, is of no importance. The fact when proved establishes the agency. The suit is for the enforcement of contracts and obligations made by the agents. The only proper subjects of inquiry are whether these contracts are valid and subsisting, or, to be specific, whether *they* are barred by the statute of limitations. Unless it appears affirmatively upon the face of the bill that they are so, the defense can be raised only by answer.

The act of congress of June 29, 1876, supplementing section 5220 R. S. U. S., is as follows:

"That when any national banking association shall have gone into liquidation under the provisions of section fifty-two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity in the nature of a creditors' bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdic-

tion in equity in the district for which such association may have been located or established."

Prior to this enactment there was no specific remedy for the enforcement of the individual liability of shareholders except in those instances in which a receiver had been appointed by the comptroller of the currency. But the statute is remedial only, and provides for the enforcement of the same right or obligation as that which in other cases is enforced by the receiver, and if the creditors' bill was the usual or only remedy employed for that purpose there would have arisen no doubt that the authorities hereinafter cited are strictly applicable to the determination of the nature and duration of the shareholders' liability.

In the light of these authorities, to which we solicit your honor's careful attention, we respectfully submit the following propositions: First that the shareholders' liability is to the creditors of the bank, and to them alone. Second, that in a case like the present the right of action is in the receiver and in him alone. Third, that this right of action arises as soon as, the bank having been found to be insolvent, a receiver has been appointed and continues as long as there remain unsatisfied creditors of the association whose claims are enforcable against the latter. Fourth, that the order of the comptroller directing the receiver to enforce the individual liability of the shareholders to the extent named in the order does not confer upon nor create in the receiver a right or cause of action, but is simply and only an authority for him to execute a right and prosecute a cause which he already

had. This is clear as well from the fact that the order of the comptroller is not specifically required or mentioned in the statute, as from the language of the act from which the supreme court has held, it arises by implication. The statute enacts that the receiver may, "if necessary to pay the debts of the association, enforce the individual liability of the stockholders;" but it is held in Kennedy v Gibson, 8 Wall, 489, that the receiver cannot exercise this right in the absence of a direction so to do by the comptroller, because the latter is alone in a situation to know whether and to what extent the necessity for so doing exists. The right of action is solely in the receiver in all cases for the collection of the assets of the bank, and in only this particular instance is the authority of the comptroller requisite, and that solely for the special reason named. Says the court in Bank v. Kennedy, 17 Wall, 19:

"The language of the statute authorizing the appointment of a receiver to act under the direction of the comptroller means no more than that the receiver shall be subject to the direction of the comptroller. It does not mean that he shall do no act without special instructions. His very appointment makes it his duty to collect the debts and assets of the association. With regard to ordinary assets and debts no special direction is needed; no unusual exercise of judgment is required. They are to be collected of course; that is what the receiver is appointed to do."

It is as though A as the agent, and on behalf of B, has a cause of action in his own name against C, but is not permitted to begin suit thereon until he is authorized or directed so to do by D, another agent of B. In such case it is plain enough that when D tells A to sue he does not create in or confer upon the latter a cause of action,

but simply entitles him to prosecute one which he already has. And further, if D delays giving the authority until the right of action is barred by the statute of limitations in favor of C the order will not revive it. And so in this case, if the comptroller had waited until all claims on behalf creditors against the bank and its stockholders had become barred by lapse of time, his order would not have been effectual to remove the bar. But if the statute begins to run only at the date of the comptroller's order, such might have been its necessary effect.

In our opinion also a specific order by the comptroller to begin this action was not requisite. The necessity which renders such order indispensable did not arise. Those facts and circumstances which render it proper or expedient to enforce the individual liability of shareholders are not pertinent to the inquiry whether it is advisable to seek to enforce that liability against one as transferrer in fraud of the statute, who has ceased to be a shareholder. The receiver is in most cases, for obvious reasons, better capable to decide the question of such advisability than is the comptroller, and hence we think that this case, in this respect, falls within the rule of the decision in Bank v. Kennedy, 17 Wall. 19, and of this court in Hayden v. Thompson, 71 Fed. Rep. 60.

The stockholder's liability, besides being a contract liability, is a liability not to the bank, but to its creditors. As the supreme court say, in Richmond v. Irons:

"Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of the

corporation."

As to these obligations, the shareholders, to the extent of their liability, are to be treated as, and are in legal effect, partners. The officers and agents of the bank, in contracting the indebtedness of the bank, contract at the same time and by the same means, the indebtedness of the shareholders, and, to the extent of the individual liability of the latter, are the agents of the latter as well as of the former, and one liability can be extinguished sooner than the other only by payment. It is for this reason alone that the liability of the shareholder survives against his estate, or his executor or administrator. It is a part of the assets of the bank, so long as the claim of creditors can be enforced against any of the bank's assets.

Thus says Judge Blodgett, in Irons v. Manufacturers National Bank, 21 Fed. Rep. 197.

"So far as the clause of the national bank act which I have quoted has been construed by the courts, it seems to me to have been assumed that it was the intention of congress to make this a contract liability. These cases are, Davis v. Weed, 44 Conn. 569; Hobbs v.. Western National Bank, 9 Fed. Rep. 469; Davis v. Stevens, 17 Blatch. 259; Laing v. Burley, 101 Ill. 591. From all the various provisions of the act, it seems to me that it was the intention of congress to make this liability, to the extent of the par value of the stock, over and above what the stock had cost, an asset of the bank, to be resorted to in the event of insolvency, or a guaranty fund, so to speak, in case the property of the bank was insufficient to pay its debts. Whoever became a shareholder assumed this liability as an element of his contract. He is declared individually responsible for the liability of the bank, to the extent of the amount of his stock, at the par value thereof, and this

responsibility attaches as soon as the relation of shareholder is assumed, and continues until the relation ceases. * * * It seems to me to be a liability which survives against the estate of the deceased shareholder, to the same extent as if the shareholder had, at the time he subscribed and acquired his stock, signed a written agreement to pay an amount equal to the par value of the stock, on the debts or liabilities of the association, when called upon by the receiver of the bank to do so; and such an agreement undoubtedly would survive as against the representatives of the shareholder's estate."

This doctrine is expressly reaffirmed by the supreme court of the United States in Richmond v. Irons, above cited, the court saying, among other things:

"Admitting that this liability is not strictly an asset of the bank, because it could not be enforced for its benefit as a corporation, nor in its name, yet it is treated as a means of creating a fund to be applied with and in aid of the assets of the bank toward the satisfaction of its obligations. The two subjects of applying the assets of the bank and enforcing the liability of the stockholders, however otherwise distinct, are by the statute made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank."

In Mining Co. v. Woodbury, 14 Cal. 265, concurred in by Mr. Justice Field, who was then a member of that court, and quoted and affirmed in Davidson v. Rankin, 34 Cal. 503, in the construction of an almost exactly similar statute, the court say:

"It would seem, from a just and reasonable construction of the constitution and statutory provisions upon this subject, that an individual corporator, in respect to his personal liability for the debts of the corporation does not occupy the position of a surety, but that of the principal debtor. *His responsibility commences with that of the corporation, and continues during the existence of the indebted-*

ness. It is not in any sense contingent, but is declared to be absolute and unconditional. The remedial effect of these provisions, in which consists their value, should not be impaired by construction. Similar provisions in other statutes have generally been construed in the same manner. It has frequently been decided that the members of a corporation who are answerable personally for the corporate debts and liabilities, stand in the same position in relation to the creditors of the corporation as if they were conducting their business as a common partnership.'

In Allen v. Sewall, 2 Wend. 327, construing a like statute, the court say:

"Individual liability in the act must be understood in contradistinction to corporate liability, and the defendants must therefore be held responsible to the same extent, and in the same manner, as if there was no act of incorporation."

To like effect are

Moss v. Hoagland, 2 Hill 265.

Hager v. McCullough, 2 Denio 119.

And

Corning v. McCullough, 1 N. Y. 47.

one of the syllabi in which is:

"Where the charter of an incorporated company provides that the stockholders should be liable for its debts, and that a creditor may, after judgment obtained against the corporation, and execution returned unsatisfied, sue any stockholder and recover his demand, such stockholders are liable in an original and primary sense like partners, or members of an unincorporate association, and their liability is not created by the statute of incorporation."

In Schalucky v. Field, reported in the 16th N. E. Rep. at page 904, the supreme court of Illinois had occasion to

decide this exact question, and held explicitly and distinctly that a claim against a shareholder, under a similar statute, did not become barred until the expiration of the time at which the claim against the corporation became also barred, saying among other things:

"Inasmuch as the liability of the stockholders to the creditors is primary, and must be regarded as that of partners unincorporate, it follows that the stockholders occupy the same relation to the creditors as the bank does, so far as the statute of limitations is concerned. The stockholders owe the same debt to the depositor which the bank owes, and can be sued for that debt just as the bank may be sued, and as soon as the bank may be sued. There is no reason why the remedy should be pursued within a shorter time in the one case than in the other. It is true that the entries in the pass-book are made by an officer of the bank and not by the stockholder, but such officer, in making the written entries, acts as the agent and representative, not only of the corporation entity known as the bank, but of the stockholders regarded as unincorporate partners. The written evidence of indebtedness is as binding upon the latter as upon the former. The liability of the stockholder ends at the same time that liability on the part of the corporation ends, and not sooner."

1 Wood on Limitations, Sec. 140.

And in Fleischer v. Rentchler, 17 Ill. App., 17 Bradwell's Reports 402, the court say:

"The only question arising upon this record for our determination is presented by the action of the court below in holding that the statute of limitation in five years bars the action.

"The defendant in error insists that the cause of action disclosed by the declaration brings the case within section 15 of the general statute of limitations, while the plaintiff in error contends that it is governed by section

16 of the same act. By section 15, all actions on any unwritten contracts, express or implied, must be brought within five years after the cause of action accrued, and section 16 permits an action on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidence of indebtedness in writing, to be brought within ten years after the cause of action accrues. Two different periods are thus fixed in which an action may be brought for breach of contract, not dependent upon the name or character of the action upon which the obligation is to be enforced, but the kind of proof required to sustain the action, whether written or unwritten. If this certificate of deposit be a written contract, or other evidence of indebtedness in writing, binding upon stockholders as a primary obligation, either by their own act or by obligation of law, it would clearly seem that it would fall within the class of actions named in section 16, and not be barred until ten years after it became due and payably."

The court then proceeded to cite and discuss the decisions of the supreme court of that state in several cases, and arrives at the conclusion that a contract, being such an one as was not barred by the statute of limitations against the corporation, was for that reason not barred as against the stockholders, whose liability thereupon was primary, as in the case of other partners, saying:

"Their liability upon the contract was coeval with that of the corporation; both became bound at the same time and by the same contract,—the bank as an incorporation, they as partners, with definite and separate interests represented by the amount of stock held by them respectively and, thus limited, their liability upon the contract creating the indebtedness was co-extensive with that of the corporation incurring it, upon their as well as its own behalf. Their obligation becoming thus fixed and absolute to discharge the debts and liabilities of the corporation according to the terms and conditions of the contract tract creating them, it seems to legally and logically follow

that their liability would continue so long as the debt is a subsisting obligation against the corporation and they still hold stock of the corporation not yet applied to the discharge of such debts and liabilities. Were this not so, the anomalous case would be presented of a statute making these stockholders liable as partners upon the contracts of the corporation at the time of their inception, and yet stand discharged from such original liability from the mere lapse of time, while the indebtedness is confessedly not paid, but is still a valid claim against their representative, the corporation, and will so continue for years. This result could not certainly have been contemplated by the legislature in enacting this provision preserving the personal liability of the members of the company. The object of the legislature clearly was to make them liable for the debts of the corporation in the way and manner the same were contracted, the act of incorporation not availing them in the least if they made default to comply with the contracts thus entered into through its agency."

Now it will not be contended that it appears upon the face of this bill that all or any of the indebtedness against the Capital National Bank, for which the shareholders thus became primarily liable, has been satisfied by payment, or has become barred by the statute of limitations. On the contrary it is a matter of general knowledge that a large volume of this indebtedness remains unpaid, and that, if any of it would have been otherwise barred as against the corporation, it has been kept alive either by the adjustment and allowances by the receiver, under the the directions of the comptroller of the currency, or because of having been prosecuted to judgments against the bank. And inasmuch as these authorities all hold, and appear to be in consonance with the decisions of the supreme court of the United States and the courts of the several states, that the liability of a stockholder is not ex-

tinguished so long as the liability continues against the bank, it seems to us that for this reason alone, if for no other, the demurrer to be overruled.

SECOND:

There is another course of reasoning that leads to the same result. The liability to creditors of a shareholder in a national bank is analogous to the liability of stockholders in other corporations for their unpaid subscriptions upon their shares. The subscriber to shares of capital stock in a bank agrees to pay the par value thereof in installments as provided by the act of congress, and also at the same time and by the same contract, agrees to pay, if required, an equal sum in addition for the satisfaction of creditors of the bank. That this additional liability is a trust fund for the benefit of creditors in every sense in which unpaid subscriptions in other corporations are so, we take it for granted will not be denied. In fact the bank act almost if not quite explicitly declares it so to be. With respect to unpaid subscriptions they are treated as so far a trust that the statute of limitations is held not to run in favor of their subscriber until he has assumed an adverse attitude toward the person entitled to demand their payment. In order to start the statute running there must first be a call or assessment by the board of directors or by a court of equity, and a demand of and refusal of payment. This is the doctrine of the United States supreme court as announced in the below cited cases. Now, when the comptroller makes an order directing the receiver to enforce the individual liability of shareholders the order evidently has reference only to such persons as

are really shareholders and appear as such on the books of the bank, and the receiver fully obeys the order by demanding payment of such persons, and upon their refusal proceeding to collect by suit. It would be illogical as well as inexpedient, for several reasons, to hold that the comptroller's order without demand would create a cause of action or render the shareholder's attitude adverse. In the first place, the comptroller's order is made *ex parte* and not by corporate officers or by a court of whose action the shareholder may be presumed to have had notice, and he ought not to be put to the expense and inconvenience of suit until it has been brought to his attention by demand from the receiver. Secondly, shareholders in such institutions are often widely scattered, and if the statute begins running at the date of the comptroller's order it may often happen that the bar will have become complete in the state or territory of the stockholder's residence before the receiver will have learned his whereabouts so as to be able to begin suit. Thirdly, as we have argued elsewhere herein, the comptroller is not vested with judicial powers or with the right to create, arrest, or continue a cause of action which is solely in the receiver for the benefit of creditors and over which the statute gives the comptroller no authority, except to say when and for what sum it may be prosecuted.

All these reasons, we think, apply with special force to one who has been, but has ceased to be, a shareholder and who has transferred his stock with actual or constructive notice that the bank was, or was likely to become, insolvent: Such a person although he may know of the extent of the insolvency of the bank, and of the comptroll-

er's order, may in many, perhaps in most, cases rest upon the reasonable presumption that his transferee, who has assumed in the language of the statute, all the liabilities of a stockholder, is financially responsible and will alone be looked to by the receiver for the payment of the assessments. At the same time he may be fully aware of his own obligation therefor and be ready to discharge the same upon request, and, perhaps look to his transferee for reinbursement. Or the circumstances may be such that he will have no doubt that his transferree will make the payment upon request, or even without request, so as to save him from the trouble and expense of so doing. Now, it does not seem to us that it can be reasonably claimed that such a person under such circumstances, as soon as the comptroller's order is made, and without actual notice thereof, or demand by the receiver, is bound to hunt up the latter and tender him the amount of the assessment. Although he may be legally liable he may have been guilty of no actual fraud, and of no fraud or deception at all, towards his transferree, who may be morally as well as legally, bound to discharge the obligation and, so far as he knows, at least, financially able so to do. How under such cirumstances can his attitude be considered as adverse until the receiver hai demanded payment from him and been refused. On the other hand the receiver may be ignorant of the circumstances which charge the transferrer with actual or constructive notice of the insolvency of the bank, and may remain so until he has exhausted his remedies against a transferree, at first supposed to be responsible but who finally turns out to be otherwise and until the full period of the statute of limitations, which in

some jurisdiciions is extremely short, shall have elapsed. When for the first time he discovers these facts and demands payment from the transferrer ought it to be a sufficient answer for the latter that three or four years have elapsed since the date of the comptroller's order? We think not, but that it ought to be a sufficient reply to such an answer that the transferrer's liability was a trust fund; that whoever else was ignorant or negligent, the trustee had been at all times familiar with the facts that created and preserved the trust and that he had given no indication of an intention to repudiate it until his refusal of the receiver's demand, and that therefore, prior to such refusal, there had been no reason in law or in morals for beginning a suit against him for the recovery of moneys which, for aught that was known, he was ready to pay on request.

In Glenn v. Howard, 81 Ga. 383, 8 S. E. Rep. 636, a corporation became insolvent and made a general assignment for the benefit of creditors. After the lapse of more than the period of limitations a bill in equity was filed against the corporation, pursuant to the prayer of which, among other things, an account was taken and a decree entered making an assessment upon shareholders, who were not parties to the suit, for a part of their unpaid subscriptions to the capital stock. This decree was not entered until fourteen years after the date of the assignment, and nine years after the filing of the bill: The period of limitations in Georgia where the defendant Howard resided and was sued on the decree, was five years. The defense was the statute of limitations. The court say:

"Under the facts alleged in the delaration, was the cause of action barred? The supreme court of Virginia in a similar suit, involving the same question (Vanderwerken v. Glenn, 6 S. E. Rep. 806) held that the statute of limitations did not commence to run until after the call was made under the decree above referred to. The supreme court of Maryland, when the question came before it, held to the same effect. (Glenn v. Williams, 60 Md. 95.) The supreme court of Alabama, in a case involving the same question (Glenn v Semple, 80 Ala. 159) likewise held that the statute of limitations did not begin to run until this call was made. Here, then are three courts of last resort in three different states of the Union that have directly decided the question made in this case. We are aware that there is a decision to the contrary by Judge Brewer of the United States circuit court (Glenn v. Dorsheimer, 23 Fed. Rep. 695), in which it was held that where an insolvent corporation ceases to do businesss and assigns all of its property, including unpaid stock subscriptions, to trustees for the benefit of its creditors, the liability of its stockholders at once becomes absolute, and the statute of limitations begins to run in its favor and against such trustees and creditors immediately. And this is the only decision to the contrary that we have been able to find directly upon the question. Other cases have been referred to by learned counsel who argued the case, which seem to look in that direction,—and I must say for myself that there is a good deal of reason in favor of the decision of Judge Brewer—but the weight of authority is unquestionably against the ruling of the court below in this case. Under the act incorporating this company, a call was to be made upon the stockholders for their unpaid subscriptions, whenever necessary, by the president and directors of the corporation. No such call was ever made, and in the deed of assignment no authority was given to the assignees to make a call; and it is a rule in chancery, well recognized and uncontroverted, that whenever the subscribers fail to pay up their stock, and the officers of the corporation will not make the call, a court of chancery will make it, at the instance of any creditor, as was done in this case. When the call was made under the decree in this case, it became a call as effectually as if it were made by the officers of the corporation, who were au-

thorized by the charter to make it. Until this call was made, the statute of limitations did not commence to run."

Since the rendition of the above opinion, there have been decided to the same effect,

Glenn v. Saxton, 7 Pac. Rec. (Cal.) 420.
Aldrich v. Gates, 95 Fed. Rep. 78.
Western Nat, Bank v. Recklen, 96 Fed. Rep. 70.
Scoville v. Thayer, 105 U. S. 143.
Hawkins v. Glenn, 131 U. S. 319, 9 S. C. R. 739.
Glenn v. Liggett, 135 U. S. 353, 10 S. C. R. 867.

In Hawkins v. Glenn, *supra*, the court, discussing the question when the attitude of the stockholder, who is held to be a trustee *sub modo*, becomes adverse so as to start the running of the statute of limitations, and the necessity therefor of a demand upon him, or its equivalent, say:

"Unpaid subscription are assets, but have been frequently treated by courts of equity as if impressed with a trust *sub modo* upon the view that,, the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds to be accounted for as held in trust, and that, therefore, statutes of limitations do not commence to run in respect to them until the retention of the money has become adverse by a refusal to pay upon due requisition."

And again, quoting from Scoville v. Thayer, 105 U. S. 143:

"There was no obligation upon the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed

the creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company his obligation was to pay the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete."

And it was held that

"When stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. But under such circumstances, before there is any obligation upon the stockholder to pay, without an assessment and call of the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment; and it is clear the statute of limitations does not begin to run in his favor until each order or demand."

And in Aldrich v. Gates, 95 Fed. Rep. 78-81, it is held that in the case of an actual shareholder of a national bank the order of the comptroller does not suffice until followed by an actual demand. And in Glenn v. Williams, 60 Md. 93-124, the court say:

"It was only from the time of the assignment made by the decree of the court in Virginia that the statute of limitations began to run; and it was only from that time, *or the time of demand made by the defendants for payment of the assessment*, that the right of action accrued to the plaintiff as trustee."

If the foregoing propositions are sound the demurrer

ought to have been overruled. The defense of the statute of limitations cannot be raised by demurrer unless the bill discloses affirmatively that the cause of action sued upon is barred. Thus, Hazard v. Dillon, 34 Fed. Rep. 485, was an action against trustees for an accounting and distribution of dividends and profits upon the completion of a trust concerning the construction of a railroad. The defense of limitations was sought to be raised by demurrer, but was overruled because the bill did not "show upon its face when the road was completed or when the right to final accounting accrued;" and Brown v. Rins, 106 U. S., was a bill to obtain an accounting from an agent to whom moneys had been entrusted for investment. The circuit court dismissed the bill on demurrer upon the ground that the suit was barred by the statute of limitations, but the supreme court overruled this decision, saying:

"It does not appear from the bill that the defendant intended, by investing in the particular mode stated in his letter, to assume a position of hostility to his principal, or to hold the proceeds, if any, of that investment, in his own right. As therefore, it does not clearly or distinctly appear from the bill that the suit was barred by limitations, the demurrer should have been overruled."

This is the rule also in Nebraska, in Mills v. Rice, 3 Neb. 76, which was an action for damages for breach of covenant of warranty. The court say:

"In respect to the statute of the limitations raised on the demurrer, it is only necessary to remark that the face of the petition does not show when the right of action accrued by reason of ouster and dispossession of the premises, and therefore, so far as the action rests on the breach of the covenants of warranty, and for quiet enjoyment,

this ground of defense is not well taken by demurrer."

THIRD.

But if the action is held to be upon the contract of subscription or of shareholdership, it seems to us that the conclusion must be the same, because in such case the contract, as is alleged by the amended bill, is in writing; that is to say, the evidence of such contract and the whole of such evidence is written. The statute of Nebraska upon which the contention arises is as follows (Code of Civil Procedure, section 10):

"Within five years, an action upon a specialty or any agreement, contract, or promise in writing or foreign judgment."

Section 11: "Within four years, an action upon a contract not in writing, expressed or implied. An action upon a liability created by a statute other than a forfeiture or penalty."

In our view this question is free from complication, and easy of solution.

The liability of the shareholders is said by the supreme court in Stuart v. Hayden, 169 U. S. 1, 18 S. C. R. 274, affirming Richmond v. Irons 121 U. S. 27, 7 S. C. R. 788, to be "An essential element in the contract by which the stockholders become members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock."

Now, this contract, whether it be one of original subscription at or prior to the date of corporate organization,

or whether it be by accepting and receipting for certificates of shares of stock originally issued to another, and procuring the transfer to be made upon the books of the bank, is, and of necessity must be, a contract in writing. As is said by Judge Campbell, in Railway Co. v. Duncan, 28 Mich. 147:

"It has never been provided by law, so far as I know, that anyone can become an original owner of stock by contract without some written subscription or undertaking in such manner as the law allows. * * * There is no common-law method of becoming a stockholder in a statutory corporation:"

In Lewis' Administrator against Glenn, 6 S. E. Rep 866, the supreme court of Virginia, in discussing this question, says:

"But it is strenuously contended that this is not an action founded upon a promise in writing, but upon a mere chose in action, and does not come within our statute (section 17, ch. 141, Code 1873,) which authorizes an assignee to sue in his own name only on 'any bond, note or writing not negotiable;' and that, as a chose in action is not assignable at common law, and is only made so by our statute when in writing, the plaintiff, it is said, had no right to sue in his own name. If the action could be considered as founded solely upon the subscription, that subscription being in writing, and not negotiable, the assignee, under the terms of our statute, would clearly have the right to sue in his own name; he having been as already shown, invested with complete authority to do so. But the action is not founded upon the subscription alone, for it is obvious that upon it, without more, no right of action would ever accrue, but it is founded upon the contract obligation of the subscriber to contribute to the capital stock of the company; and this contract becomes mutual and binding when the subscription is duly made and ac-

cepted. The contract obligation thus perfected constitutes a foundation for an action but no right of action accrues thereon until an authorized call is made. It is frequently the case that more or less confusion arises from a failure to distinguish between the cause and the right of action. 'A cause of action is said to accrue to any person when that person first comes to a right to bring an action. There is, however an obvious distinction between a cause of action and a right, though a cause of action usually confers a right. Thus statutes of limitations do not affect the cause of action, but take away the right.' (1 Bouv. Law Dict. 247.) Hence in Patterson v: Lynde 106 U. S. 521, 1 Sup Court Rep. 432, it is said: 'The liability of the stockholder is upon his subscription, that is to say, upon his obligation to contribute to the capital stock." It is therefore clear that the present action is not founded upon the subscription alone, nor upon any mere implied obligation, but upon the contract obligation perfected by subscription, duly made and accepted, and the default of payment as required by the call judicially made. In this case, as both the fact of subscription and that of acceptance, too (as we shall presently see), are in writing,—that is, evidenced by writing, and not negotiable,—why is it not assignable under our statute? And why may not the assignee sue thereon in his own name? Why is not a contract evidenced by writing as much as made through ordinary course of mail where one party proposes and the other accepts by like means? The peculiar value of the writing is in its evidential character, and it is not essential to the validity of a contract thus evidenced that the written evidence of both proposal and acceptance should be on the same piece of paper. Hence the subscription is conceded to be in writing, and the books of the company fully recognize the alleged subscriber as being such."

A man may be estopped *in pais*, or by parol, from denying that he became a stockholder or shareholder in such corporation; that is from denying that he has made the contract: or he can be held, as in the case cited from Bissell by counsel for defendant, to have become a stockholder because his agent has entered into a contract in

his behalf and for his benefit, although in the agent's name; or under some circumstances he may be held liable as though he was a stockholder, although he is not one. But whenever it is alleged that he is or has been a stockholder, or member, in fact, the allegation can be proved only by showing that he entered into an express contract and that contract can be expressed only in writing.

An oral contract of subscription, or an oral transfer of corporate shares, so as to render the person making it a member of the corporation, would be such a thing as has never before been heard of. An oral agreement, upon sufficient consideration, may make one the equitable owner of shares, with the corresponding rights and obligations, including the right to be invested with the legal title and installed as a legal member, but with such a situation we have nothing to do in this case. The bill alleges that the shares in question were acquired by Thompson at the date of their original creation, certificates therefor being at that time issued and receipted for by him; and in the absence of such allegation it will be presumed, from the fact of his having been a shareholder as alleged in the bill, that he was an original subscriber.

Pittsburg Ry. Co. v. Appleget, 21 W. Va. 172.
McHose v. Wheeler, 45 Pa. St. 32.
Turnbull v. Payson. 45 U. S. 148.
Glenn v. Orr, 2 S. E. 538.
Jackson v. Trear, 20 N. W. 764-769.
Galveston Hotel v. Bolton, 46 Tex. 633.

When a person becomes a member of a corporation,

whether by original subscription or by purchase of its shares, he becomes expressly bound by the act of incorporation and the articles of association. Whatever rights and liabilities these instruments make applicable to members are read into his contract of membership as fully to every intent and purpose as though he had subscribed his name to the instruments themselves. This proposition is so well settled as to be almost self-evident, and citation of authorities in its support would be an act of supererogation. The four years statute of limitations applies to "contracts not in writing, expressed or implied."

No one can become the legal owner of corporate stocks, or the legal member of corporations by implication, but only by an express contract or agreement. There is only one way in which that contract can be expressed, and that is, by written subscription to or assignment of shares of stock which may be evidenced by certificates and transferred upon the books of the bank, as provided in section 5139, U. S. R. S.

A conclusive answer, as it seems to us, to the reasoning by which counsel for defendant support their contention, that the liability of the stockholders is statutory, is found in the language of the supreme court in Richmond v. Irons, 121 U. S. 27, 7 S. C. R. 788, and repeated and affirmed in Stuart v. Hayden, 169 U. S. 1, 18 S. C. R. 274. Say the court:

"Its obligation (that of individual liability) becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the

stockholder instead of by the corporation. There is nothing in the statute to indicate that obligation arising upon these undertakings and promises should not have the same force and effect, *and be as binding in all respects, as any other contracts of the individual stockholders.*"

That is to say, the receiver enforces a contract which was made, not with the corporation, but with its creditors, which, for that reason, the corporation cannot enforce, nor the receiver in its behalf, but which he does enforce on behalf of the creditors alone, and this contract is in writing. Counsel do not seem to discriminate between an implied contract and that which the contract implies. They are quite different things. The statute imposes no liability except upon such persons as have entered into the contract. Hence, in order to tender a cause of action, the complainant must plead and prove the contract; and this can be done in only one way, that is, by the written records of the corporation. It is immaterial that this statutory covenent is not transcribed upon those records or copied into the certificate of shares. By force of the law it is as much a part of them as if it had been.

Possibly an illustration can make this clearer. The statutes or Nebraska provide, that, in the absence of an express contract as to interest, obligations for the payment of money shall bear interest at the rate of 7 per cent per annum from and after the date of maturity. Suppose I give you my promissory note payable ten day after date for $100. Four years and eleven months after date I pay you $100, which is the only sum mentioned in the note. Then four years and eleven months still after the date of this payment you sue me for the five years interest

thereon. Is there any doubt that this action is on the note, or as to which period limitation applies? Would the case be different in any way if the note had read "ten days after date I promise to pay $100 with interest thereon at the rate of 7 per cent per annum from maturity until paid?" Did I not, by agreeing to pay the $100, agree to pay the interest after maturity? It is true that this agreement would not exist but for the statute, and that it is not expressed, but implied, but it is implied not independently of, but in and by the contract. If the contract had been oral it would have been barred in four years, and its implied obligation would, of course, have been barred with it; but it being in writing, the implied obligation continues until it is itself extinguished.

So, the contract of the shareholders being in writing, the implied obligation "arising out of it," as the supreme court say, will not be barred until after the lapse of such time as would bar any other written obligation, because, as the supreme court again say, it is "as *binding in all respects* as any other contracts of the individual stockholder."

Even if, for the sake of argument, we admit that a person CAN become a stockholder in a national bank by an oral contract, nevertheless such a fact would be without force in a case where the shareholder actually did receive written certificates of stock and receipted for the same in writing. A might borrow $500 of B, and not give his note for the same, but promise orally to repay it in ninety days. If suit were brought, it would have to be brought, within four years of the date when the sum became due.

But if a note were given, the five-year statute would govern. The reasoning of respondent's counsel is to the effect that, because suit must be brought on an oral agreement within four years, if the same agreement should happen to be in writing nevertheless the suit will be barred in four years.

To recur to our illustration of the note which fails to designate any rate of interest. By the terms of our statute such a note would bear 7 per cent interest after maturity. By the reasoning of respondent's counsel the contract to pay 7 per cent interest after maturity would be an *implied* contract, for the recovery of which suit would have to be brought within four year after maturity. We would then have the ridiculous spectacle of a plaintiff suing on a note after four years, and before five years after maturity, recovering the principal of his debt, but barred from recovering his interest, because the contract to pay the interest was an implied contract and barred after four years.

We regard this illustration as exactly in point and fair to the position of council, and we submit that it is an excellent case of "*reductio ad absurdam.*" If the respondent's contention is correct, it certainly follows that A cannot recover his 7 per cent interest from B unless he commences suit before the expiration of four years from the time the debt became due. To show that a party can be held liable upon a contract in writing, without his signature being subscribed to such contract, and that the acceptance of a certificate by defendant was equivalent to signing, and makes his contract a written one within the

meaning of the statute of limitations, we submit the following authorities:

Plumb v. Campbell, 18 N. E. (Ill) 790, Wilkin, J.

This case originated in the circuit court on a declaration on asumpsit to which the defendant below interposed the five year statute of limitations. The first plea avers that the contract sued on was not in writing, and the second that it was partly in writing and partly by parol, to both of which appellee replied that it was a contract in writing. The writing relied on was a contract to sell certain bonds for plaintiff at a certain price, and signed by defendant alone. Plaintiff delivered the bonds and maintains that this is a wrttten contract on which he might bring his action at any time within ten years under section 16, ch. 88, Revised Statutes, while appelant contends that it could only become an agreement when decided by parol evidence, and is therefore an oral contract governed by the provisions of section 15 of the same chapter, barring the action in five years. The contention of the appellant is that, for want of an agreement on the part of appellee to do anything on his part as shown by the writing, there is want of that mutuality which is necessary to every complete contract. But a promise lacking mutuality at its inception becomes binding on the promisor after performance by the promisee,(Willitts v. Ins. Co., 45 N. Y. 45, citing Train v. Gold, 5 Pick, 380; Hilton v. Southwick, 17 Me 303; L'Amoreux v. Gould, 7 N. Y. 349; R. R. Co. v. Graff, 27 Ia. 99, R. R. Co. v Bartlett, 3 Cush. 224.) Proof of assent on the part of promisee is not necessary. It is sufficient if the required act is performed by him. (Hare,

Cont. 304.) We perceive no reason in distinguishing this from an ordinary contract in writing, in applying the statute of limitations, and therefore hold that the action was not barred.

Kennedy v. Siemers, 25 S. W. 512, McFarlane, J.

Grantors in a trust deed who did not sign the contract with the defendant were bound by its conditions and covenants, when they received benefits under it, and one of them made a written assignment of it, which was attested by the others. "We think there is no significance in the fact that the Siemers agreement was not signed by Brault and Bunch, the other parties interested in and to be benefited by it. Its acceptance by them was sufficient to bind them to its covenants and conditions." Citing Ferry Co. v. Chicago & A. R. Co., 73 Mo. 403; and Heim v. Vogle, 69 Mo. 529.

Indianapolis Nat. Gas Co. v. Kibby, 35 N. E. (Ind.) 392. Howard, J.

Contract giving party of second part right to bore gas wells on a certain tract of land. Signed by party of first part, accepted and recorded by party of second part. "Appellant's contention is that this court has never been in force, for the reason that it was not signed by the party of the second part. This question has been expressly decided against the position assumed by counsel. The signing and acknowledgment of the instrument by the party of the first part, and the acceptance and recording thereof by the party of the second part, make it a contract between the parties," citing Railway Co. v. Fisher, 125 Ind. 19, 24 N. E. 756, and Harlan v. Gas Co., 32 N. E. (Ind.

Sup.) 930.

Rigdon v. Conley, 30 N. E. (Ill.) 1060, Craig, J.

A written contract between defendant and plaintiff signed by defendant and found in the possession of the plaintiff is admissible in evidence on behalf of plaintiff, although it has not been signed by him, since by his acceptance of it the contract has become binding on him. (Syllab.) "The theory of this instruction," an instruction the refusal to give which is alleged as error, "is that the contract existing between the plaintiff and defendant required the plaintiff to pay in cash $7,000 into the hands of Rumsey & Co. The written contract introduced in evidence will not admit of that construction."

McCampbell v. M'Faddin, 9 S. W. (Mo.) 138, Mabbie, J.

"When one party to a written contract signs, and the other accepts it without signing, the one failing to sign is as fully bound as if he had signed, and, as a consequence, is also entitled to its benefits to the same extent as if he had signed."

Grove v. Hedges, 55 Pa. St. 516.

It is assuredly plain law that if a party, who has not put his name to a written contract, accepts it when signed by the other party, it binds him the same as if he had signed it.

Vogel v. Pekoc, 42 N. E. 386.

Contract for hiring signed by one party only. "It will be observed that the written contract was not signed

by the parties named therein as parties of the first part, and it is insisted by the plaintiff that, as they failed to sign the contract, it never became binding upon him or any other person. The acceptance of the contract by the parties of the first part and holding it and acting on it as a valid instrument, may be regarded as equivalent to its formal execution on their part."

Johnson v. Dodge, 17 Ill. 440.

Contract to sell land made by an agent for principal and not signed by vendee, but accepted by him and part of the purchase price paid. *held*, "In this case the contract, if Inglehart had authority to make it, is the contract of Dodge and in writing; and it is the settled construction of the statute of frauds that the authority *to the agent* need not be in writing.

Stone v. Pennock, 31 Mo. App. 544.

Griffin v. Bristle, 40 N. W. 523.

Action for conversion of wheat delivered to defendant, and following received in return: "No. 92. Carver station, Sep. 13, 1886. This is to certify that L. H. Griffin has stored 123 1-6 bushels No. 1 hard wheat for shipment to G. W. Ehle & Co., Minn., Christ. Bristle, buyer." The testimony of plaintiff as to his not knowing anything about Ehle & Co. was insufficient to impair the effect of this written instrument. The fact that this instrument was signed by only one of the parties does not prevent its operative effect as evidence of the contract.

Bradon Mfg. Co. v. Morse, 48 Vt. 327, Pierpont, Ch. J.

The contract upon which this action is brought is in these words: "I hereby agree to deliver to the Brandon Mfg. Co. at their works in Brandon before March 15, 1872, 100 cords of beech and maple wood, etc., for the sum of $4.75 per cord." and signed by Morse. This contract was accepted by plaintiffs, who are now trying to enforce it. When this contract was accepted, it became binding on both parties the same as if it had been signed by both. The time when the payments are to be made is not fixed by the contract, but the law fixes it as definitely and with as much certainty as it could be by words. The legal force and effect of the contract is that the plaintiffs should pay for the wood at the stipulated price when delivered on demand. There is no ambiguity about the contract that requires explanation by parol testimony. Parol testimony is no more admissible to vary the clear and settled legal meaning and effect of a contract than to vary its terms. It would hardly be claimed that it was competent under such a contract as this to show by parol that payment was not to be made until some time subsequent to the time when the 100 cords of wood should be delivered. Yet such testimony would be just as admissible as like testimony to show that the wood or any part of it was to be paid for before it was all delivered.

Bulwinkle v. Cramer, 3 S. E. (S. Car.) 776, McGowan, J.

Contract was as follows:

"May 17th, sold H. Bulwinkle & Co.
5000 bu. mixed sacked corn at 71½c
1000 " " " " at 80½c
Schooner shipment, payable on arrival. No wharfage.
(Signed) CRAMER & BLOHME."

Held that this is not a mere memorandum, but is a complete written contract between the two parties, and parol evidence is not admissible to show that the subscribing party contracted as agents, and not as principals. Cites and quotes from following English cases: Meyer v. Everth, 4 Camp. 22; Powell v. Edmonds, 12 East. 10; Smith v. Jeffreys, 15 Mees. & W. 560; Greases v. Ashlin, 3 Camp, 426; McClannaghan v. Hines. 2 Strob. 122; and Gibson v. Watts, 1 McCord, Eq. 490. All of which hold the same way on almost exactly the same kind of contract. Court say, "We think that the paper proved in this case was a contract in writing of both parties within the rule as to the exclusion of parol evidence."

A covenant in a deed that the grantee shall assume and pay an incumbrance upon the granted premises is the contract of the grantee in writing although not signed by him and is not barred until the lapse of five years. Shumaker v. Sibert, 18 Kans. 104, opinion by Justice Brewer. And in Howell v. Roberts, 29 Neb. 483, it is held that a suit to recover against stockholders because of failure to publish statements is a suit upon a contract, the limitation being the same as in other contracts.

In support of their contention in argument counsel

cited Thompson v. German Ins Co., 76 F. R. 892 and Thompson v. German Ins. Co. 77 F. R. 258.

The most cursory reading of these decisions will show that the receiver did not present to Judge Shiras the question which is raised in this case, and it did not have any consideration, nor indeed does it appear to have been even thought of. Both plaintiff and defendant conceded from the start that the four-year statute of limitations applied and the only question before the court was when the four years commenced to run. The above decisions have no value whatever in considering this case.

Judge Shiras held in the above case that the action by the receiver was upon a liability created by statute. It seems that Judge Shiras' attention had not been called to Carroll v. Green, 92 U.S. 509, where the supreme court of the United States expressly held that it was an action upon a contract. Counsel for appellee cite both decisions as authorities in their favor, and claim that Judge Shiras has settled the question *in this district* in one way, while it would appear that the supreme court had settled the same question for the *whole country* in a contrary way. The case of Carroll v. Green will not bear out the construction which counsel attempt to give it. On the contrary, a careful study of this case will, we feel satisfied, convince this court that it sustains our position. It becomes important in this place to again call the court's attention to the distinction between an implied contract and what is *implied by the contract*. In Carroll v. Green the supreme court only pointed out what was to be *implied by the contract*. The contract itself was express. Counsel for appellee attempt

to show that the case of Hayden v. Thompson, 17 C. C. A. 592-600 is applicable to this, and because the court in that case held that a suit to recover dividends unlawfully declared and distributed was upon an implied contract by the stockholders to restore the money, they contend that it follows that this suit is also based upon an implied contract. Our answer to that contention is, the right to recover the dividends did not grow out of the national bank act at all. It was a common law right of action, and could have been maintained by the receiver of a state bank. It was an action for money had and received. Further comment on this point seems unnecessary.

In the case of Davis vs. Weed, 44 Conn. 569, the court in its opinion on page 581 say:

"The original liability of the intestate to pay the assessment which may be ordered by the comptroller was a voluntary agreement, evidenced by his subscription or by his becoming a stockholder. It is not imposed by way of forfeiture or penalty. It is imposed by the statute. *But it also exists by virtue of the contract which the intestate entered into when he became a stockholder.* When a stockholder dies his estate becomes burdened with the same contract or agreement which the dead man had assumed and so long as it, through the executor or administrator, holds the stock as the property of the estate and the stock has not been transferred on the books of bank, and the liability has not been discharged by same act which shows that the new stockholder has taken the place of the old one, the contract liability still adheres to the estate. This liability is not the result of any new contract, for the administrator did not voluntarily become the owner of the stock, it came to him as the dispenser of the goods of the dead, and the liability rested upon the stock and was a part of the contingent liability of the estate, at least until it was transferred to some other person by a transfer free from fraud. (Corn-

ing v. McCullough, 1 Comst. 47; Bailey v. Hollister, 26 N. Y., 112; Loury v. Inman, 46 N. Y. 119; Hawthorne v. Calef, 2 Wall. 22. Gray v. Coffin, 9 Cush. 192.)"

The position taken by by the court in that case exactly sustains our contention.

We will also call your honor's attention to the case of Howell v. Manglesdorf, 33 Kan. 194, 5 Pac. Rep. 759. The court in speaking of a statute substantially like the one under consideration, say:

"While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation. An action to enforce the same is transitory and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder."

Citing Flash v. Conn, 109 U. S. 371; Dennick v. R. R. Co., 103 U. S. 11; McDonough v. Phelps, 15 How. Pr. 372; Seymour v. Sturgis, 26 N. Y. 134.

The circuit court of appeals, second circuit, so lately as July, 1897, had this same question under review, and arrived at the same conclusion, saying:

"The means which the statutes provide to enforce the individual contractual liability determined and fixed the question of the amount which must be paid by each stockholder individually, and which in no manner depends upon what any other stockholder could or ought to pay. As the statute was not penal, it is not important whether the liability is called statutory or one based upon contract. It is statutory because it did not exist at common law, and it is contractual because every one who becomes a member of the company by subscribing to its stock assumes its liability.'" Citing Flash v. Conn. *supra*.

In R. R. Co. v. Clarke, 29 Pa. St. 146-152, the court say:

"The question here is whether one member of the corporation has been legally substituted for another The title of the original stockholder was established by written evidence, and could have no legal existence without it. (Thames Tunnel v. Sheldon, 6 B. & Cres. 341.) The title of the substitute must be shown by evidence of the same character"

Since preparing the foregoing brief our attention has been called to the decision in Scott v. Latimer, 89 Fed. Rep. 843, in which, under the peculiar circumstances disclosed by the pleadings in that case, an assessment was enforced against a stockholder who, for four years, had appeared as such upon the books of the bank, but whose relation with the bank was alleged to have been induced by fraud. In the majority opinion of the court, written by Judge Shiras, it is said that,

"Suits of this character, strictly speaking, are not actions based upon the contract of subscription existing between the corporation and the stockholder."

And in that opinion there are several other expressions to substantially the same effect; but, nevertheless, even the majority opinion proceeds upon the ground, and holds the defendant liable solely because of the fact that he was a stockholder; and under the circumstances it was held that he was not in a position to have his contract of shareholdership rescinded and set aside on account of the alleged fraud. Nothwithstanding these expressions the writer of the opinion was unable to escape the express language of the banking act, section 5151 U. S. R. S., which creates this liability against, and only against, per-

sons who are "the shareholders of every national banking association."

The true doctrine seems to us to have been apprehended and to have been clearly expressed in the dissenting opinion by Judge Sanborn, who says, among other things:

"It is true, as shown in Scoville v. Thayer, and other cases cited, that the stockholders' liability, and the maintenance of the action upon it, is not dependent upon the terms of the contract of subscription, where those terms are in conflict with the law or the statute, as was a contract that the stock was non-assessable. But the existence of a valid contract of subscription, or an estoppel from denying its existence, is a *sine qua non* to the existence of the liability and the maintenance of the action. Without it there can be no stockholder, and hence no liability of the stockholder. Where a contract is induced by fraud, and is rescinded without negligence or delay, as soon as the facts constituting it are discovered, it is as though it had not been, and there remains neither contract nor stockholder nor liability of the stockholder. In all the cases that have been cited in which the liability was enforced, a contract of subscription or purchase which had not been induced by fraud, or which had been ratified after its discovery, existed, and the stockholders in those cases were held because as well said in Pauly v. The Trust Co., 165 U. S. 606, they were the real owners of the stock or held themselves out, or allowed to be held out, as owners in such a way and under such circumstances as, upon principles of fair dealing would estop them as against creditors from claiming that that they were not in fact owners."

So that we think we may say, without fear of successful contadiction, that no case can be found in which it does not appear upon analysis of the opinion that it has not been held that the right of recovery is dependent upon

the existence of a valid contract of shareholdership in a corporation, although one of these cases says that it is unimportant whether this liability be called statutory or contractual. It can only exist in those cases in which there is in fact a contract, and it must arise, if at all, out of the contract, and in the true sense of the word the action must be upon the contract, because, without alleging, and proving the contract, no cause of action is tendered at all. As we have already said, cases may possibly arise where the relationship is established by way of estoppel resting in parol. Whether or not, if such a case should arise, the four years statute would apply to it, is not the subject of the present controversy. In this case the relationship exists by reason of the certificate of shares and a written receipt of the defendant therefor upon the stub book and written records of the corporation; and it is this certificate, this receipt, and these records that constitute the contract of legal stockholdership; and they are all in writing. If the plaintiff is unable to prove the existence of these writings, he cannot recover in this action upon the case stated in his bill. Upon the matter tendered in his bill, the existence of parol contract or parol estoppel cannot be proven. Plaintiff seeks to recover solely upon an express legal obligation created as above stated.

FOURTH.

In the court below counsel for appellee contended that this action should have been brought on the law side of the count, and in their argument relied upon the following authorities:

Kennedy v. Gibson, 8 Wall. 498.
Casey v. Galli, 94 U. S. 673.
Flash v. Conn, 109 U. S. 371, 380.
Bailey v. Sawyer, 4 Dillon 463.

When your honors come to examine the authorities cited you will find that in each case the suit was brought against the actual stockholders who were shown by the books of the bank at the date of the failure to be the owners of stock. It follows, therefore, that all of said cases are worthless as authorities in the case at bar.

It appears from the allegations of the bill that this is an action, *not* against a stockholder, but against one who was *formerly* a stockholder, but *who had conveyed* his shares in the Capital Bank, in order to evade his liability to an assessment, and that the object of the proceeding is to compel him to pay such assessment notwithstanding his said conveyance, because he had at the time knowledge of the insolvent condition of the bank, and made such transfer of his shares for the purpose of avoiding his liability. The case thus presented bears no resemblance to the facts in the cases relied upon by appellee. In the latter there was a simple legal liability, which liability could be fully declared by an allegation that the defendant was a stockholder of the insolvent bank when it closed its doors. No other allegations were necessary except the formal statements that the comptroller had made an assessment upon the stock. How different in the case at bar. In this case, had the complainant stopped with the allegation that Mr. Thompson had once been a stockholder, but prior to the failure of the bank he had conveyed his shares

to other parties, it is evident that he would have disclosed no cause of action. It was necessary to go further and declare that at the time of such conveyance he had KNOWLEDGE of the insolvent condition of the bank and and that he made the conveyance with the *intent* to avoid his liability. Here are two ingredients not necessary to be alleged and proven in an action at law, to-wit, *knowledge* and *intent*. In a suit against an actual stockholder neither "*knowledge*" or "*intent*" is of the slightest consequence. These allegations of "knowedge" and intent" resolve our bill into a bill of discovery, which must of course be brought in equity. It does not seem necessary for us to enlarge upon this proposition. We quote from the opinion of the supreme court of the United States in Bowden v. Johnson, 107 U. S 256, which opinion really makes all argument superfluous. The quotation is as follows:

"It is contended for the appellees that this is not a case of equitable cognizance, because a plain, adequate, and and complete remedy may be had at law. But the case is one of a transfer of the legal title to the stock made to defraud the creditors of the bank. The evidence of title to the stock is the final assignment on the books of the bank. This being a bill for discovery as well as relief and the fraudulent transfer being good between the parties, and only voidable at the election of the plaintiff, it is clear that equity has juridisction to set it aside and enforce the liability of the transferrer."

Incidental to the above question is the point attempted to be made by appellee, contended for in his argument in the court below:

That the object sought is to fix the amount of the de-

fendant's liability at a much greater sum than can be determined by the stock books of the association; that the undoing of a fraud is peculiarly the province of a court of equity, uut that its powers are never exercised in that regard without having before it all parties to be affected thereby; that if a court of equity may set aside a transfer in the absence of one of the parties thereto for the purpose of imposing a liability, it may also set it aside for the purpose of conferring a benefit; that such a rule cannot be tolerated; that the rule is well established that in an action to set aside a fraudulent conveyance the fraudulent grantee is a necessary party defendant; that this is well established in this court by the holding in Hayden, Receiver v. Stuart, which case was affirmed by the circuit court of appeals for this circuit and subsequently reaffirmed by the supreme court of the United States."

It required considerable hardihood for counsel to cite the Stuart case as supporting the principle which he is attempting to apply to this case. If the decision in the Stuart case settles one issue above everything else, it is that a suit may be properly brought against an ex-stockholder to recover an assessment, without making the transferree a party on the ground that the transfer was made with guilty knowledge and intent on the part of the transferrer. Indeed so emphatic was the supreme court on this point that it thrust Gruetter & Joers, the transferees, out of court and set aside a judgment in their favor for nearly $20,000, on the express ground that the contention between them and Stuart was not proper to be adjudicated in the suit by the receiver against Stuart the transferrer, and the court annouced that it was not necessary to adjudicate the question as to the condition of the title to the stock, and it *did not set aside the transfer of the stock to Greutter & Joers* though it *did* affirm a judgment against

Stuart the transferrer. This case ought so. and does, settle the question. The other authorities above cited by counsel for respondent are well enought in cases where the apply. but they have no bearing on this case for relief that can possibly offect the transferrees. They may keep their stock and be welcome to it. We only ask to set aside Thompsons's Transfer in equity so far as itmight relieve him of liability, but not in law so as to affect the transferrees' ownership and their rights resulting therefrom to the slightest extent.

Both of the cases Bowden v. Johnson and Stuart v. Hayden were in equity, and in neither was the title to the shares as between the transferrer and the transferree set aside or attempted so to be, but, because the title had passed out of the transferrer by a formal transfer upon the books of the bank, the aid of a court of equity was requisite for discovering the intent with which the transfer was made, and to set it aside as between the transferrer and the receiver. This is the rule announced in Bowden v. Johnson and adhered to and followed in Stuart v. Hayden without express reference to it. The decree of the court of appeals in the latter case, which was affirmed by the supreme court, left the title to the shares in Gruetter & Joers untouched, and the supreme court said that the issue as to where that title was, or ought to be, was foreign and immaterial to the controversy between the receiver and Stuart. The principle is the same as in a suit in equity by creditors to set aside a conveyance of real estate to a grantee in fraud of the former. By an overwhelming weight of authority

the fraudulent grantor is not a necessary party to such a suit, because the title as between him and the grantee, and his interests, are wholly unaffected by the result. But there has never, on that account, been thought to be any doubt about the jurisdiction in equity. The cases holding that the presence of the grantor is necessary have done so on the sole ground that the suit involved the determination of the amount of *his* debts and an investigation of *his* alleged fraud. But this cause does not involve any such investigation or determination with respect to Thompson's transferees. There is, however, a cloud upon the legal title of the vendor or grantor in the latter case analogous to that in the former, and an obstacle to the enforcement of legal remedies of exactly the same character; and these, as is held in Bowden v. Johnson, afford the reason for the interposition of a court of equity. Complainant is not seeking to collect or enforce any debt or obligation against any of Thompson's transferees, nor does he charge them with any fraudulent or unlawful conduct or intent, nor even with participation with any such intent by Thompson, nor does he seek to deprive them of any property, nor to charge any property in their hands with any lien, or to divest them of any title or legal right. He simply says this: that Thompson, by becoming a stockholder in the bank, had entered into a certain contract relation, in writing, with it and its creditors; that he claims that by reason of the transfer of his shares he has become absolved from that contract; that as appears by the books and records of the bank, and the transfer, his contention is true; but that, by reason of his knowledge of the condition of the bank at the time of the transfer

and the motive which induced him to make the transfer, he is equitably obligated in all respects as though he still remained the legal owner of the shares, and, inasmuch as he cannot now be sued at law as such legal owner, the aid of chancery is invoked to uncover the true nature of the transaction, and to enforce his equitable liability on, as the supreme court say, "his contract of membership."

Besides, we think that the act of congress of June 29, 1876, supplementing sec. 5220 R. S. U. S., was intended to vest in the creditors of the liquidating association the same remedy which was therefore available only by a receiver, to-wit. "A bill in equity in the nature of a creditors' bill" to enforce the individual liability of shareholders.

Since the foregoing was put in type the opinion in De Weese v. Smith, 97 Fed. Rep. 309, has been published and come to our notice. It is by an exceedingly able judge and we are gratified to find it fully in accord with our argument upon both the propositions that the liability of the shareholders is contractual and in writing and that no cause of action arises thereon until demand. Says the opinion:

"It must be conceded that the right of action against the stockholders created by this statute is one arising *ex contractu*. 'As the ownership of stock, in most cases, arises from the voluntary act of the stockholders, he must be regarded as having agreed or contracted to be subject to the obligation.' (Bank v. Hawkins, 174 U. S. 370, 19 Sup. Ct. 742.) So Judge Blodgett, in Irons v. Bank (D. C.), 21 Fed. Rep. 198, said: 'It was the intention of con-

gress to make this a contract liability.' The statute declares what the liability of the stockholder is. Therefore when a stockholder takes his stock the provision of the statute, in contemplation of law, is regarded as written into his subscription. This constitutes his undertaking, the bond of his obligation; and when proceeded against to enforce this liability, it is essentially a declaration on a contract."

In conclusion the opinion holds that a cause of action for the so-called "assessment" does not arise until there has been a demand therefor, and inferentially though this last point was not necessarily involved in the case, that the order of the comptroller constituted a sufficient demand without proof of its having been brought to the personal knowledge of the stockholder.

With the opinion, as a whole, as applied to the facts of the case at bar, we are content; but the citation of King v. Armstrong, 34, N. E. (Ohio) 163, we regard as a strong endorsement by a very high court of the contention in our first point, that the order of the comptroller does not in any way affect the running of the statute of limitations. The reasoning of the Ohio court is so nearly parallel with our own contained in our first point that we will not occupy space by repeating it here. The shareholders' liability is to the creditors of the corporation and for their benefit. When the bank has passed into the hands of a receiver, they are deprived of a right of action which they might otherwise have had for its enforcement. It does not seem to us that their right can be postponed by any act of omission or commission by an officer whom they have not appointed and whose conduct they cannot influence; nor on the

other hand, does it seem to us the comptroller can by any act revive a cause of action which has already become barred, yet either result might accrue from the doctrine that his order creates the cause of action. If, however as we have argued, the contract, being with the creditors, accrues when their cause of action against the bank accrues, and subsists as long as their right continues, just as clearly would have been the case if no right of action had been vested in the comptroller, the analogies of the law will be satisfied, and the statute of limitations will not be pleadable by a stockholder until the obligations of the bank shall be satisfied or the estate fully administered and the receiver discharged.

When the claim of a creditor is allowed by the comptroller or ascertained by the decision of a court it is established not only against a corporation of which the stockholder is a member, but also against a partnership of which he is a member, and he becomes and continues to be bound by it to the extent of his individual liability. just as he would be bound by a judgment against any other partnership of which he was a member. Just as any other partner is a party to any suit or proceeding against his partnership and is bound by the determination of it in every way and to every extent as though he had been individually named therein, so is a shareholder in a national bank a party to and bound by the determination of every prodeeding against the bank as though he had been individually named therein. And until the debts ascertained and determined in the manner provided by law

have been satsified, or the trust has been fully administered and the receiver discharged, he remains bound to the extent of his individual liability as a shareholder.

We think the decree of the circuit court ought to be reversed and the appellee ruled to answer.

JOHN H. AMES,
ANDREW E. HARVEY,
Solicitors for Complainant.

No. 95.

Br. of Rose for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

Filed Oct. 29, 1901

No. 95.

JOHN W. McDONALD, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA,

Appellant,

v.

DAVID E. THOMPSON,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEE.

HALLECK F. ROSE,
Counsel for Appellee.

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BRIEF OF APPELLEE.

I.

Statement of the Case.

THE case is here on appeal from the judgment of the United States circuit court of appeals for the eighth circuit, affirming a decree entered in the circuit court for the district of Nebraska, dismissing complainant's bill. Suit was brought, after the making of an assessment by the Comptroller, to enforce the individual liability of the shareholders of the Capital National Bank of Lincoln, Nebraska, created by the National Banking Act (Rev. St. U. S. sec. 5151). The assessment made by the Comptroller was levied pursuant to the provisions of

section 5234, Revised Statutes U. S., which provides among other things, that the receiver appointed by the Comptroller may, if necessary to pay the debts of the association, enforce the individual liability of the stockholders.

Mr. Thompson is the sole defendant. In the original bill (pp. 4, 5, Printed Record) there was a prayer that a transfer of the shares formerly owned by defendant to Charles W. Mosher, Richard C. Outcalt and Esther C. Barton be set aside. In the amended bill, however, the only relief prayed is a decree that defendant pay the assessment made by the Comptroller upon said shares, to the amount of $21,000 and interest (p. 14, Printed Record). In the circuit court a demurrer to the amended bill was sustained. The grounds assigned for the demurrer were the following:

1. That the complaint hath not in and for his said bill made or stated such a case as entitles him, in a court of equity, to any discovery from this defendant, or to any relief against him as to the matters contained in said bill, or any of such matters.

2. That it appears by the said amended bill that Charles W. Mosher, Richard C. Outcalt, and Esther C. Barton, mentioned and described in said amended bill as transferees of the certain 210 shares of the capital stock of the Capital National Bank, alleged to have been previously held by defendant, and each of them are necessary parties defendant, without whom no relief can be had in equity against said alleged transfer, and that there is, therefore, a defect of parties defendant to said amended bill.

3. That the complainant is not entitled upon said amended bill to the relief he prays for, because he had a plain and adequate remedy at law.

4. That the complainant is not entitled upon said amended bill to the relief he prays for, because it appears by the said amended bill that the cause of action therein set forth, and by complainant sought to be enforced against defendant, accrued more than four years prior to commencement of suit, and is, therefore, barred by the statute of limitations.

II.

It appears on the face of the bill that complainant's cause of action is barred by the statute of limitations.

THE ruling of the circuit court was that the cause of action was barred by the Nebraska statutes of limitation. The statutes of Nebraska prescribing the time for commencement of civil actions are sections 5 to 27, inclusive, of the Code of Civil Procedure. (Compiled Statutes Neb.) The provisions governing the present action are as follows:

Section 5. Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued.

Sec. 11. Within four years an action upon a contract not in writing, express or implied; an action upon a liability created by statute other than a forfeiture or penalty.

The settled policy of congress has been to permit rights created by its statutes to be enforced in the manner and subject to the limitations prescribed by the laws of the several states. The statutes of limitations are equally binding on courts of equity and courts of law. (*Campbell v. Haverhill*, 155 U. S. 610; *Hayden v. Thompson*, 17 C. C. A. 592; *Butler v. Pool*, 44 Fed. 586; *Miles v. Virian*, 25 C. C. A. 212; *Cockrill v. Butler*, 78 Fed. 687.)

The rule under which the federal courts have uniformly held the state statutes of limitations to apply to causes arising under federal laws is expressed in a federal statute (Rev. St. U. S. sec. 721), which provides as follows:

The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.

The statute imposing the liability sought to be enforced, being in derogation of the common law, is to be strictly construed, and not extended beyond its plain terms. (*Dane v. Dane Mfg. Co.*, 14 Gray (Mass.) 488; *Gray v. Coffin*, 9 Cush. (Mass.) 192, 199; *Ripley v. Sampson*, 10 Pick. (Mass.) 371; *Coffin v. Rich*, 45 Me. 507, 511; *Hooper v. Slate Co.*, 71 Pa. St. 293; *Appeal of Means*, 85 Pa. St. 75; *Libby v. Tolcy*, 82 Me. 397; *Chase v. Lord*, 77 N. Y. 1.)

Carroll v. Green, 92 U. S. 509, expressly holds that the individual liability of shareholders rests upon an implied promise, resulting from their accepting the stock burdened with the statutory provisions creating such liability. From the syllabus we quote as follows:

Held, That as the liability of the stockholders arose from their acceptance of the act creating the corporation and their *implied promise* to fulfill its requirements the proper remedy was an action upon the case, and that as the statute barred such an action at law, it was also a good defense in equity.

In the opinion it is said:

By taking the stock the terms were acceded to, the contract became complete, and the stockholders were bound accordingly. The same result followed which would have ensued under like circumstances between individuals. The assent thus given, and the *promise implied*, are of the essence of the liability sought to be enforced. (92 U. S. 513.)

The court, therefore, held that the action was governed by the statute of limitations regulating actions on implied contracts, which, in South Carolina, as in Nebraska, barred the action in four years.

In *Terry v. McClure*, 103 U. S. 142, it was held that the statute of limitations is a bar to a suit, brought four years after a bank in South Carolina had permanently suspended specie payments, by a holder of its notes, to enforce the individual liability of the shareholders. This

decision expressly approved and followed the former holding in *Carroll v. Green*; so also did the case of *Godfrey v. Terry*, 97 U. S. 171.

In *Terry v. Little*, 101 U. S. 216, it was said by Chief Justice WAITE:

The individual liability of stockholders in a corporation is always a creature of the statute. It does not exist at common law. The first thing to be determined, in all such cases, is, therefore, what liability has been created?

In *First National Bank v. Hawkins*, 174 U. S. 372, 19 Supt. Ct. 742, Mr. Justice SHIRAS, speaking of the nature of the individual liability of stockholders in national banking associations, said:

Undoubtedly the obligation is declared by the statute to attach to the owner of the stock, and in that sense may be said to be statutory; but, as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation.

In *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, the action was brought by the District of Columbia, a municipal corporation, to recover from a street-railroad company the cost of maintaining pavements in a street, which the company was, by its charter, bound to maintain. The charter was granted by an act of Congress. One of the defenses interposed to the action was the statute of limitations. In the opinion delivered by Mr. Justice BRADLEY, it was said:

The court below, in its opinion on the demurrer, suggests another ground, having relation to the form of the action, on which it is supposed that the plea of the statute of limitations in this case is untenable. It is this, that the action is founded on a statute, and that the statute of limitations does not apply to actions founded on statutes or other records, or specialties, but only to such as are founded on simple contract or on tort. We think,

however, that the court is in error in supposing that the present action is founded on the statute. It is an action on the case upon an implied assumpsit arising out of the defendant's breach of a duty imposed by statute, and the required performance of that duty by the plaintiff in consequence. This raised an implied obligation on the part of the defendant to reimburse and pay to the plaintiff the moneys expended in that behalf. The action is founded on this implied obligation, and not on the statute, and is really an action of assumpsit. The fact that the duty which the defendant failed to perform was a statutory one does not make the action one upon the statute. The action is clearly one of those described in the statute of limitations. The case of *Carroll v. Green*, 92 U. S. 509 (23: 738) is strongly in point. That was a bill against stockholders of an insolvent bank to enforce their liability for double the amount of their stock, according to the provisions of the charter. It was held by this court that the liability of the stockholders arose from their acceptance of the charter, and their implied promise to fulfill its requirements, and that the legal remedy to enforce it was an action on the case, to which the statute of limitations would apply; and hence, that it applied to a bill in equity founded on the same obligation.

"In the foregoing precedents it must be conceded to be the established rule of this court that the liability of the shareholder, under the statute, rests upon an implied contract not in writing. The rule of limitations barring "An action upon a contract, not in writing, express or implied" has been applied, without exception, in this court. Under these precedents the stockholder, it is true, is held to have impliedly assumed the statute burden imposed, and the action to enforce the liability is upon such implied promise. The shareholder is not held to have made any *express* agreement, either verbal or written, to pay for the benefit of creditors, in event of the insolvency of the association, a sum equal to the capital stock held by him. That obligation is expressly imposed by the inherent and

superior force of the statute alone. If this specific statutory requirement had no existence, then the liability of the shareholder would not subsist; but the right to own and hold the shares of stock would remain. The implied promise therefore is raised upon the statute, and is a mere incident of the statute-burden, and does not arise out of any express contract in writing executed by the shareholder.

It is also the settled rule in this court that the statute of limitations commences to run against a stock subscription, payable as called for, from the date of the call. *Hawkins v. Glenn*, 131 U. S. 319; *Glenn v. Liggett*, 135 U. S. 533; *Glenn v. Marbury*, 145 U. S. 499.)

In *Van Pelt v. Gardiner*, 54 Neb. 705, the supreme court of Nebraska, whose judgments must be conceded to be authoritative upon the interpretation of the statutes of limitations of that state, here under consideration, refers to the four years' limitation as applicable to actions to enforce individual liability of stockholders, as a matter of course.

The federal courts, subordinate to this court, have, without exception, applied the rule adopted by the lower courts in the case at bar, when called upon to interpret and apply the authoritative rules of limitations announced by this court in the cases above cited. The assessment made by the Comptroller is held, by analogy, equivalent to a call upon the shareholder; and under the authority of *Glenn v. Marbury*, 145 U. S. 499, cited by Circuit Judge CALDWELL in the case at bar, the cause of action on the assessment is held to have accrued on the day when, by the terms of the order of the Comptroller, it is made due and payable. Suit against the shareholder being maintainable at that date, the statute of limitations then commences to run.

Aldrich v. McClaine, 106 Fed. 791, was a case decided by the circuit court of appeals for the ninth cir-

cuit, February 14, 1901, reviewing a decision of the circuit court for the western district of Washington (98 Fed. 379). The case involved the identical question that is raised on this record by Mr. Thompson. The statute of limitations of the State of Washington, which controlled the decision, provided that "an action upon a contract or liability, express or implied, *which is not in writing and does not arise out of any written instrument*" may be commenced within three years after the cause of action shall have accrued.

Thompson v. German Ins. Co., 76 Fed. 892, was a suit prosecuted in the United States circuit court for the district of Nebraska, to recover an assessment made by the Comptroller. The procedure was the same as in the present suit, except that the transferees were impleaded as defendants to the bill. In his opinion sustaining a demurrer to the bill, SHIRAS, District Judge, said:

> The next ground urged in support of the demurrers is that the bill, upon its face, shows that the proceeding is barred by the lapse of time under the provisions of the statutes of the state of Nebraska, which provide that * * * actions upon contracts not in writing, express or implied, and actions upon a liability created by statute, other than a penalty or forfeiture, must be brought within four years after the right of action has accrued. (Compiled Statutes Neb. 1895, 5599-5601.)
>
> In the case at bar no suit was commenced until after the expiration of four years after the assessment was made by the Comptroller. It is well settled that the statute begins to run from the date the call or assessment becomes due and payable. (*Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739; *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867; *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. 914; *Liggett v. Glenn*, 2 C. C. A. 286, 51 Fed. 381.)

A demurrer was subsequently sustained to an amended bill filed in the same case, the opinion by the same judge being reported in 77 Fed. 258.

In *Hutchings v. Lampson*, 82 Fed. 960, Judge GROSSCUP,

in applying the limitation of five years prescribed by the statutes of Illinois for bringing suit upon an oral contract, to a suit against a stockholder for enforcement of a statutory liability, said:

The legal source of liability in actions like this, which seems to have met the approval of the supreme court of the United States (*Carroll v. Green*, 92 U. S. 509), may be stated as follows: The shareholder acquiring stock in a Kansas corporation impliedly undertakes, by virtue of the constitution and laws of Kansas entering into the contract, to be personally liable to creditors of the corporation to the extent of his stock, in the contingency that the corporation itself cannot pay its debt. The liability, therefore, is a contract liability and resides in the act of accepting the stock of such a corporation. The action upon such liability is not, therefore, upon a written promise or undertaking to pay money, nor upon any judgment, but upon the stockholder's implied promise in his act of accepting the stock. In this view of the case, the five-year limitation applies. It follows, therefore, that the demurrer to the declaration must be sustained.

Uhrich v. Yates, 95 Fed. 81, cited by appellant, is a ruling by District Judge EVANS made in the circuit court for the district of Kentucky. In that case the Comptroller, in the first instance, had only made an assessment of $16 per share. That officer later ascertained that this assessment was insufficient and, the individual liability of the stockholders not having been exhausted, made a further assessment of $5 per share. The case involved the power of the Comptroller to make a second assessment. Having held the power to exist, the rule of limitation for its enforcement was held to be the same as upon an original assessment. In the opinion it is said:

The plea of the statute of limitations raises the other question to be determined. The provision of the law applicable to the case is contained in section 2515 of the Kentucky Statutes, which provides that actions upon

liabilities created by statute shall be brought within five years after the cause of action accrued, when the statute creating the liability fixes no other period. * * * The general liability of the shareholder is created by operation of the statute *eo instanti* his becoming a shareholder, but there did not then arise a cause of action upon that liability. * * * The right to enforce that liability by suit could not arise * * * until the amount needed was ascertained and fixed by the comptroller. * * * That a right of action would have accrued on the first assessment as soon as there was a demand for its payment is clear. If the then receiver, in that instance, had sued for more than $16 per share then assessed, could he have recovered for the excess? Clearly not; and the reason necessarily is that no cause of action for a greater sum had then arisen. * * * The liability in general terms exists; but a cause of action upon that liability—that is to say, the right of the receiver to sue upon it—does not exist nor arise until the assessment is made by the comptroller, for until that time the amount is neither due nor demandable. * * * The conclusion I have reached is that the right of action in this case exists by virtue of those acts of the comptroller called "assessments," and that the remedy is not barred by any statute of limitations, because the right of the receiver to sue did not arise until long after March 4, 1891.

The opinion quoted from cites and expressly follows the ruling of Judge SHIRAS, made in the district of Nebraska in *Thompson v. Ins. Co.*, 76 Fed. 892 and 77 Fed. 258, applying the four years' limitation. It has since been held in the circuit court of appeals for the ninth circuit that the comptroller has power to make a second assessment, where the aggregate does not exceed the par value of the stock, and that his determination of the necessity therefor is conclusive on the stockholder. (*Ulrich v. Campbell*, 97 Fed. 663.) So far as these cases involve the question of limitation, they seem to support the contention of appellee that the cause of action arises upon the making of the assessment, and that the statute com-

mences to run when, by the terms of the Comptroller's order, the assessment is due and payable.

Counsel for appellant evidently neglected to pursue the case of *Scott v. Latimer*, 33 C. C. A. 1, further than the court of appeals. In view of their harsh criticism of the opinion of District Judge SHIRAS, and their maintenance of the doctrine contended for in the dissenting opinion of Circuit Judge SANBORN, indulged at pages 45 and 46 of their brief, it will doubtless be embarrassing to them to learn that the identical judgment was reviewed by this court and that the majority opinion delivered by the district judge was approved.

Scott v. Downes, 180 U. S. 202, was on writ of error to review the judgment rendered in the case of *Scott v. Latimer*, 33 C. C. A. 1 in the circuit court of appeals for the eighth circuit. The case was by a receiver of a national bank to recover from a stockholder the amount of an assessment made by the Comptroller of the Currency. Defendant claimed the right to rescind his subscription by reason of fraud and false representations made to induce it. Judgment was in favor of the receiver on the pleadings, notwithstanding the answer contained averments of fraud sufficient to avoid the shareholder's contract of subscription. The superior force of the statute imposing the liability was held to be controlling; and it was adjudged effective to hold the shareholder answerable to the assessment in spite of the infirmity in his subscription contract. That holding is not reconcilable with the contention of appellant that the liability inheres in the contract of subscription. From the opinion by MR. Justice HARLAN we quote the following:

But immediately upon the failure of the bank the rights of the creditors attached *under sec. 5151*, and a shareholder who was such when the failure occurred could not escape the individual liability *prescribed by that section* upon the ground that the bank had issued to him a certificate of stock before, strictly speaking, it had authority to do so. * * *.

The present suit is primarily in the interest of the creditors of the bank. *It is based upon a statute* designed not only for their protection, but to give confidence to all dealings with national banks in respect to their contracts, debts, and engagements, as well as to stockholders generally.

In *Delano v. Butler*, 118 U. S. 634, the payment of a voluntary assessment of one hundred per cent. by the shareholders was held not to affect the statutory liability.

Cockrill v. Butler, 78 Fed. 679-687, was a suit in equity brought by the receiver of the First National Bank of Little Rock against directors of the bank to enforce a liability imposed upon them under the provisions of section 5239 of the Revised Statutes of the United States. It was held that the proper remedy at law would have been an action on the case; and the remedy at law being barred by the statute of limitations, the action in equity was also barred.

In *Hayden v. Thompson*, 17 C. C. A. 592, the four years' limitation provided by the Nebraska statute was applied to a suit in equity by the receiver of the Capital National Bank to recover from stockholders the amount paid to them in dividends improperly declared.

The New York decisions seem to have taken the lead in holding that the individual liability of shareholders to the creditors of the corporation is founded on contract. If this contract is the written certificate of shares issued by the corporation, then it is a contract under seal, for the corporation must issue its stock certificate under its seal. The statute of limitations for actions on contracts under seal in New York is twenty years. For actions on express or implied contracts the limitation is six years. The New York courts have invariably held that the action to enforce this liability is barred in six years. (*Corning v. McCulloch*, 1 N. Y. 47; *Wyles v. Suydam*, 64 N. Y. 173; *Flash v. Conn*, 109 U. S. 371, 377.)

Hawkins v. Furnace Co., 40 O. St. 512, was a suit against shareholders to enforce a statutory liability under a section of the Ohio statutes reading as follows:

All stockholders * * * shall be deemed and held liable to an amount equal to their stock subscribed in addition to said stock for the purpose of securing the creditors of such company.

In the opinion it was said:

The liability of the stockholder is to pay the debt of the corporation, not his own debt. His obligation is distinct and *dehors* that of the company. Being a mere collateral security or promise it must have a fixed limitation. We cannot accede to the proposition that the limitation is shifting and diverse, corresponding identically to the unexpired periods of limitation on the corporate debts. If the statute had made the liability primary and direct, thus binding the stockholders to the very terms of the corporation debt, a suit to enforce the liability would be virtually against him as original debtor, and upon the debt, and its proper limitation would apply. But as already stated no such liability is imposed. On the contrary, as we have seen, the provision is secondary and in the nature of, if not purely, a suretyship clearly definable and not at all coincident with the principal obligation. * * * His [plaintiff's] company became insolvent. He has his action in virtue of the statute. Without the statute there is no right of action. Is this statute liability within the six years' limitation, either as a liability created by statute, or an implied promise? The action is governed by the limitation act of 1852 (S. & C. 948). One of its provisions is this: "Within six years. An action upon a contract not in writing, express or implied. An action upon a liability created by statute other than a forfeiture or penalty."

We think the action falls within this limitation, and is properly of the class described in the latter clause. It also embraces the elements of an implied contract. * * * We therefore interpret the phrase, "a liability created by statute," to mean a liability which would not exist but for the statute. The stockholder, it is true, may be said to

impliedly assume statute burdens previously imposed; and if the parol promise only could furnish a bar, we would for the reasons stated be bound to apply it.

And such was the situation in *Carroll v. Green*, 92 U. S. 509. * * * The court held that the stockholder impliedly assumed the individual liability imposed by the charter, and that the action was barred in four years. In that case there was but the one limitation. In this case we find a promise running with the statute liability. Both are barred by statute. The assumpsit is an incident to the statute liability. But the inherent and superior force of the statute creates the obligation without regard to the promise raised by implication. There was no error, therefore, in sustaining the demurrer.

Recurring now to the amended bill (pp. 11-14, Printed Record) to ascertain the date when appellant's cause of action is alleged to have accrued, we find that interest is claimed from July 10, 1893, and that the bill contains the following averment:

Whereas upon a proper accounting by the receiver theretofore appointed to collect the assets of the Capital National Bank of Lincoln, Nebraska, and upon a valuation of the uncollected assets remaining in his hands, it did appear to the satisfaction of said comptroller that in order to pay the debts of the said association it is necessary to enforce the individual liability of the stockholders therefor, to the extent thereinafter mentioned, as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States; that thereupon, by virtue of the authority in him vested by law, he did thereby make assessment and requisition upon the shareholders of the Capital National Bank of Lincoln, for three hundred thousand dollars, to be paid by them ratably on or before the 10th day of July, 1893; and that he did thereby make demand upon each and every share of the capital stock of said association held or owned by them respectively, at the time of its failure, and thereby directed Kent K. Hayden, former receiver, by the name and designation of K. K. Hayden, the receiver theretofore appointed, to take all necessary proceedings, by suit or otherwise, to

enforce to that extent the individual liability of the said shareholders; and has since directed your orator in all things to carry out said duties and instructions.

The original bill (p. 1, Printed Record) was filed May 20, 1898, a period of four years, eleven months and ten days subsequent to the date of the assessment sued on, and four years ten months and ten days subsequent to the date when, under the express terms of the order of the Comptroller, the assessment became due and payable. On the theory most favorable to appellant his cause of action for enforcement of the assessment accrues July 11, 1893, and under the four years' limitation, prescribed by the statutes of Nebraska, had been barred for nearly a year before the filing of the original bill. The demurrer upon this ground was, therefore, properly sustained.

While it is not now an open question in this court, and the cause of action sued on, under the many and repeated rulings above cited, is confessedly barred by the limitation applicable to "an action upon a contract, not in writing, express or implied," still there naturally arose in the lower courts an inquiry as to whether the action was not intended to be comprehended within the Nebraska statute applicable to "an action upon a liability created by statute, other than a forfeiture or penalty." It may well be doubted whether any effect can be given to that provision, if actions of this character be excluded from its operation. There are respectable precedents favoring its application here. (*Hawkins v. Furnace Co.*, 40 O. St. 512; *State v. Baker Co.*, 24 Ore. 146; *Ulrich v. Yates*, 95 Fed. 81.) In these cases it was conceded that the liability was contractual, in the sense that the stockholder, by voluntarily assuming that relation, *impliedly assented* to the statute-burden. Suit to enforce that liability was nevertheless held to be "an action upon a liability created by statute," as that phrase is employed in statutes fixing a limitation for commencement of suit. The authority of standard text writers is found to sup-

port the same doctrine. (2 Thompson Com. Law of Corp. sec. 1991; 3 Id. sec. 3098; Freeman's note to *Freeland v. McCulloch*, 43 Am. Dec. 703.) The Ohio case attempted to reconcile this view with the case of *Carroll v. Green*, 92 U. S. 509.

The Nebraska statute, however, fixes the same limitation for the action founded upon a statute that is prescribed on a contract not in writing. It is not material in this case whether these views are reconcilable, because, under either line of the precedents cited, the appellant's case is barred. Judge CALDWELL of the circuit court of appeals, therefore, very properly declined to follow the divergent lines of authority, because the same limitation must, in either case, apply; and in any event, by the rule announced in many cases by this court, the appellant is confessedly barred by the limitation applicable to "an action upon a contract not in writing." The cases cited amply justify the directness and brevity of the opinion delivered in the lower court.

III.

Appellant's brief presents no meritorious argument against applicability of the four years' limitation.

The suggestion of appellant's counsel, found in the first and second points of their brief, that the fund sought to be recovered in this action is a trust fund *in esse*, held by the appellee in the right of a trustee, so that the statute will not be set in motion till after an affirmative disavowal by the trustee of his trusteeship, is so foreign to the character of the proceeding and the nature of the liability sought to be enforced, as to be manifestly absurd. Imagine a proceeding, criminal or civil, against Mr. Thompson for misappropriation of this so-called trust fund! It is not a fund *in esse* that is here sought

to be followed and reclaimed. On the contrary, the purpose of suit is enforcement of a mere civil liability, for which a simple suit at law is the usual, and ordinarily the only, remedy permissible. By what provision of the banking act does the stockholder become trustee of a fund which he holds in the right of the comptroller? How and from what source is this trust fund derived? Who, in advance of the assessment, is its custodian? Who could be held to answer, or be convicted, for its embezzlement or misappropriation? It is too plain for disputation that the only rights vested in the receiver by virtue of the assessment by the Comptroller, is a cause of action for recovery of an ascertained sum, for creation of a fund in the future. After the fund is collected it then becomes a trust, the receiver's hand being the first to impress that character upon it. The shareholder's only liability is to answer for the statute-imposed burden, and he has of right a day in court before the burden can be enforced.

In the case of *Hayden v. Thompson*, 17 C. C. A. 592, there was ground for contending that the subject of the action was recovery of a trust fund requiring a disavowal of the trust by the trustee to set the statute running. There the original fund had an existence in fact, its title being vested in the bank. The stockholders had received dividends declared and paid out of the capital stock of the bank and deposits, a fund which, under the banking act, was not subject to be so paid. But even in that case the statute of limitations was held to run in favor of the innocent stockholders or directors, taking the money in the belief it was paid from profits, from the date of its receipt. The trust fund theory was not sufficient to avoid the running of the statute. The same rule was held subsequently by the United States supreme court in the case of *McDonald v. Williams*, 174 U. S. 397.

King v. Armstrong, 34 N. E. [O.] 163, cited by appellant at page 48 of his brief, as a strong indorsement of his

position, does not have the remotest application to any point raised on this record. It was a suit by a stockholder delinquent on his assessment, and who was also a depositor in the failed bank, against the receiver to recover his ratable dividend from the funds in the receiver's hands. The plaintiff was himself debtor to that fund, and was in equity held to pay his own debt into the fund, as a condition of sharing with other creditors in distribution. This right of equitable set-off rests on grounds entirely foreign to any doctrine urged as controlling in the case at bar. It is applied to distributees of estates, in cases where an heir or distributee was owing the ancestor at the date of his decease; and the rule has also been held against a principal contractor in the distribution of funds realized on mechanics' liens, where the rights of subcontractors are involved, to whom the principal contractor is himself debtor. In such cases, although the liens, independent of the relation of debtor and creditor between the claimants, would be of equal priority, the principal contractor, who is himself debtor, is permitted to share in distribution only upon performing his own personal obligation.

Nor is there any merit in the point argued that the liability of the stockholders continues so long as there are unpaid claims enforceable against the corporation. The allowance of a claim against the corporation by the receiver does not operate to suspend the statute of limitations in favor of the stockholder. No case is cited holding to this point. The rule in California, to which appellant makes reference, is directly to the contrary. There it is held that a suspension of the right of action against the corporation, under their peculiar constitution and laws, as by renewal or extension of time for payment, does not operate to extend the cause of action against the stockholder. There the action is held to be statutory and governed by the special limitation pro-

vided for actions of that character. (*Green v. Beckman*, 59 Cal. 545; *Moore v. Boyd*, 74 Cal. 167; *Stilphen v. Ware*, 45 Cal. 110; *Young v. Rosenbaum*, 39 Cal. 646; *Hyman v. Coleman*, 82 Cal. 653.) This last suggestion, that the liability is a continuing one against the stockholder, is contrary to the express holdings of the United States supreme court in *Carroll v. Green*, 92 U. S. 509, *Terry v. McClure*, 103 U. S. 442, and *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1-13.

The suggestion that a demand must be made, and the position of the shareholder one of declared hostility to the receiver, before institution of suit, is likewise without merit, and has no application to this case under the averments of the bill. As before noted, the bill alleges the making of a demand on the shareholders at the specific date of June 10, 1893. Under the authorities cited by appellant, the cause of action then matured, and the statute of limitations began to run in favor of the shareholder, when, by the terms of the order, the assessment was payable. In this connection it is to be admitted that the Illinois court has held that the shareholder's liability under their statute was upon the debt owing by the corporation. This is the solitary holding to this effect. The doctrine has not elsewhere met with judicial sanction, but has been expressly disapproved, not only by the federal courts, but by the courts of the country generally. The case of *Schalucky v. Field*, 16 N. E. 904, cited by appellant, was a ruling made upon an *ex parte* hearing, there being no brief or argument for the appellee in whose favor judgment had been rendered in the lower court. This fact is noted in the opinion by the court; so it does not appear to be a well considered case. The other Illinois case cited, from the court of appeals, was by a tribunal whose duty it was to follow the precedents of the court of last resort of the same state. The Illinois court, however, has since, in the case of *Tuttle v. National*

Bank, 161 Ill. 497, held that a right of action against a stockholder of a corporation ordinarily exists only by virtue of some statutory enactment. It did not exist at common law; and it was accordingly ruled that an action to enforce a liability created by the constitution and laws of another state was not maintainable in the courts of Illinois. It is impossible to reconcile this holding with the case of *Schalucky v. Field*, cited in appellant's brief. It must, therefore, be admitted that the Illinois courts have not been consistent with themselves on this question, and that no reliance can be placed upon this isolated holding. The doctrine last noted, announced in *Tuttle v. Bank*, has also been applied in the case of *Mead v. Davis*, 84 Ill. App. 558. Since then Judge GROSSCUP refused to apply the rule in the early Illinois case when sitting in the United States circuit court for the district of Illinois, and expressly held in the case of *Hutchings v. Lampson*, 82 Fed. 960, that the limitation applicable was that prescribed for actions upon unwritten implied contracts.

It is not true, as asserted by counsel for appellant, that the right to own shares, or to become a member of a corporation, is dependent on the prior execution by the shareholder of a written contract defining his relationship or obligation. Corporate shares are a species of personal property, capable of being acquired and aliened in like manner as other properties and rights of a personal character. The certificate is mere evidence of ownership. Thus in *Davis v. Stevens*, heretofore cited, the individual liability created by the statute was enforced against a person whose name never appeared on the books of the bank as a stockholder. The individual liability created by statute is enforceable, not because of a written contract of membership, but in spite of such contract. If an express contract on its face provided against the stockholders' liability, the liability created by the act of con-

gress would, nevertheless, be enforceable. This has been repeatedly held and citation of authorities to the point is deemed to be needless.

The point made by appellant that actions of this nature are transitory in character, and may be maintained outside of the jurisdiction of the state imposing the liability, is not material or controlling on the question of the statute of limitations as applied to this case. The grounds on which the federal courts have held such actions to be transitory are consistent with respondent's contention that the liability is upon an implied contract not in writing. The case from the circuit court of appeals of the second circuit, referred to at page 44 of appellant's brief, is *Whitman v. Bank*, 51 U. S. App. 543. The decision follows the United States supreme court decision in *Huntington v. Attrill*, 146 U. S. 657, and adjudges the remedy prescribed by the Kansas statute in favor of corporation creditors against shareholders to be transitory, and enforceable without the state, on grounds entirely consistent with the ruling of the circuit court of appeals in the case at bar. The court quotes the following from the opinion in *Huntington's Case*:

As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered *penal* in the sense that it should be strictly construed. But as it gives a civil remedy at the private suit of the creditor only, and measured by the amount of his debt, it is, as to him, clearly *remedial*. To maintain a suit is not to administer a punishment imposed upon an offender against the state, but simply to enforce a private right secured under its laws to an individual. We can see no ground, or principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country.

The opinion then proceeds:

As the statute was not penal it is not important whether the liability is called *statutory* or one based upon

contract. It is *statutory* because it did not exist at common law, and it is *contractual*, because "every one who becomes a member of the company by subscribing to its stock assumes this liability."

It is thus clearly recognized that the statute is the source of the liability. In the sense that the liability does not exist at common law, or independent of the statute, it is clearly recognized to be statutory. But being remedial in the sense that it affords a remedy to the creditor only, and for the amount of the debt, the action is transitory in character.

The rule of the federal court is that where the maintenance of the suit operates merely to administer a punishment imposed upon an offender against the state, the action is penal, and local; but that a remedial statute affording a civil remedy to creditors, though purely statutory, is transitory in character and enforceable without the state. Within this rule it is conceded the action here is transitory, but the fact that it is transitory has no bearing on the question as to whether it is on an implied contract not in writing.

It is not deemed necessary to discuss at length the cases cited in appellant's brief, pages 36 to 41, inclusive, to the effect that the grantee of a deed or other written instrument, who accepts the writing and asserts rights under it, is bound by the covenants therein contained, without formally executing the instrument as joint maker with the other contracting party. There has been no contention between the parties as to the correctness of this doctrine, and it hardly required reference to the cases to establish a proposition so simple and elementary. It has, however, no application to any question raised by the record here presented for review. It is not alleged in the bill that respondent ever accepted any grant of privileges from the corporation by an instrument in writing obligating him to pay the receiver of

the bank or its creditors the sum sued for. Nor is it alleged that respondent ever in any manner obligated himself *in writing*, of any character, to pay the money sought to be recovered in this action. Nor does the liability by the terms of the banking act attach to the original subscriber. The shares, as already shown, are transferable like any other species of personal property. The liability is contingent, depending upon the bank's becoming insolvent; and it then attaches to the present shareholders and does not affect the original subscriber or any intermediate holder of the shares. The contention that the bill brought to enforce the liability imposed by the banking act is upon a written contract of subscription, or upon a written transfer of shares, or upon a stock certificate—the mere voucher evidencing ownership—without defining what instrument evidences the written obligation, and without averment in the bill of any such written obligation, is so obviously unsound that it ought not, perhaps, to arrest the attention of counsel, much less of the court. The citations above referred to will, therefore, be dismissed as wholly inapplicable to the case.

The cases cited by appellant to the point that the liability sought by the bill to be enforced is contractual are in no respect inconsistent with the contention of appellee that the limitation of four years applies to this case. Most of the cases are in fact cited and relied upon by appellee as sustaining his contention that the liability, if contractual, is on an implied contract, and not upon a contract in writing.

The case of *Howell v. Roberts*, 29 Neb. 483, cited to this point, and *Coy v. Jones*, 30 Neb. 788, which might have been cited, merely hold that the limitation of one year for bringing actions for enforcement of a penalty or forfeiture did not apply. It was not held, however, that the action was on a written contract. The statute was said to be *quasi*-penal, but not a penalty within the meaning of the one-year statute. Later, however, the same

statute was held to be penal, and the cases above mentioned were expressly overruled. (*Globe Pub. Co. v. State Bank*, 41 Neb. 483.) In a still later case it is held the four years' limitation applies to suits brought to enforce the individual liability of stockholders. (*Van Pelt v. Gardner*, 54 Neb. 705.)

Davis v. Weed, 44 Conn. 569, distinctly recognizes that the liability is one imposed by statute. It is not asserted to be upon a written contract. On the contrary, it cites with approval the case of *Corning v. McCulloch*, which, as already shown, holds the stockholder's liability to arise from the implied assent of the parties.

Counsel's illustration (Brief, p. 33) of the case of a promissory note drawing 7 per cent interest by force merely of the statute establishing interest rates is not applicable to the case before the court. The supposed case bears no analogy to the liability imposed upon shareholders by the national banking act. The office of the statute fixing a rate of interest in such cases is merely to prescribe a measure of damages for the non-performance of a contract obligation to pay money. There the obligation to pay interest does not exist by force of the statute alone. Without the obligation to pay the note, there is no obligation to pay interest. Damages by way of interest is a mere incident to the contract obligation, and is not the primary substantive engagement. On the other hand the obligation imposed by the statute against stockholders exists independent of the contract between the shareholder and the corporation. Instances have arisen where the terms of the contract obligation of the stockholder exonerate him from payment of the statute obligation. Notwithstanding this the courts enforce the burden imposed by statute. In the latter case, the only promise or contract following the statute is an implied one. The promise in such case is a mere incident of the statute liability. The situations presented in the case at bar and in the supposed case are, therefore, entirely dis-

similar. In one case the damages by way of interest follow solely from the non-fulfillment of an express contract obligation. In the other case the statute imposes the principal and entire obligation by its own inherent and superior force, and this obligation is enforceable, regardless of the terms of any contract, and in spite of existing contracts that the shareholders shall not answer for it.

The argument that the liability here sought to be enforced against the shareholder is that of a partner is likewise without merit. Partners are liable jointly, each member for all the debts of the partnership to the utmost farthing of his property. At common law a partnership is known only by the names of the individual members who compose it. Here there is a distinct corporate entity known by its corporate name and required to act as an artificial person. The liability imposed by the statute upon the shareholders is not a joint liability. One shareholder is not answerable for the debts of the other and cannot be sued jointly with another shareholder. A distinct liability is imposed upon the individual members, limited to the amount of stock held at its par value.

In conclusion we have to suggest that the doctrines contended for by appellant have nowhere received judicial sanction by the courts called upon to administer the national banking act and to define the liabilities created thereby. If the position of appellant is upheld it would result, practically, in the establishment of a class of actions arising by virtue of section 5151 of the Revised Statutes, subject to no limitation whatever. Receivers of national banks would constitute a class of privileged plaintiffs, subject to no limitation of time in which to institute actions against shareholders. Comptrollers in charge of this department, during successive administrations, may have, on complete investigation, determined to withhold action in particular cases as unfounded and unjust; and notwithstanding such determination, counsel

or receivers might, by authority of a new officer, after the evidence of the transaction had been lost, be permitted to fret innocent persons with actions brought against them after all their witnesses are dead. As was said by Chief Justice MARSHALL, in *Adams v. Woods*, 2 Cranch, 336: "This would be utterly repugnant to the genius of our laws. In a country within which not even treason can be presented after the lapse of three years, it can scarcely be conceived that an individual would remain forever liable for a pecuniary forfeiture."

IV.

The recognized procedure for enforcement of the individual liability of stockholders in national banks is by an action at law. The action in equity is not, therefore, maintainable.

WHEN the Comptroller orders an assessment, he conclusively fixes and establishes the amount of the stockholders' liability. In this case the bill discloses that the call was made upon the stockholders for the full amount of their statutory liability, namely, "to the extent of the amount of their stock therein at the par value thereof." There is here no marshaling of assets or liabilities to be had in court. In the action brought for enforcement of this assessment no relief is sought but the recovery of a sum certain; and for this a judgment at law is a plain, adequate and complete remedy, precluding the right to sue in equity. (*Kennedy v. Gibson*, 8 Wall. [U. S.] 498; *Casey v. Galli*, 94 U. S. 673; *Flash v. Conn*, 109 U. S. 371; *Bailey v. Sawyer*, 4 Dillon, 463.)

The bill alleges that Mr. Thompson was in fact owner of the shares on which the assessment is made at the time the bank failed, and avers that the proceedings for their previous transfer were colorable only. The object of the

suit, therefore, is enforcement of a purely legal demand by recovery of a mere money judgment. On the averments of the bill respecting the ownership of the shares and their former colorable transfer, complainant had not lost his legal remedy. As heretofore pointed out, there is no prayer in the amended bill to set aside the transfer. In construing the bill it is important also that complainant has omitted to implead the transferees, without whom the court is powerless to grant any relief other than that which may be had in the action at law. The bill is framed on the mistaken view that a mere colorable transfer will operate to deprive complainant of his remedy at law.

Davis v. Stevens, 17 Blatchf. 259, is a case decided by the late Mr. Chief Justice WAITE while holding the circuit court of the United States for the southern district of New York in 1879. The suit was at law to recover an assessment of a shareholder in a national bank, who, to conceal his ownership and escape individual responsibility, caused the stock to be transferred to another person pecuniarily irresponsible. In the opinion of the chief justice, reversing the district judge, who had directed a verdict for defendant, it was said:

So far as Elston was concerned, the transfer to him was colorable only, and it is apparent that the only object Stevens had in causing it to be made was to conceal his ownership and thus, if possible, escape all statutory liability. Such being the case, I am unable to see how he can occupy any different position from what he would if the stock had been taken directly from his own name on the books and put in that of Elston. He is still the real owner, with Elston as his agent specially authorized to hold for him the legal title. Every principal is responsible for the obligations of his agency. The debt of the agent is the debt of the principal, and always recoverable from the principal. By the rules of law which govern the relation of principal and agent, the registry on the books in the name of Elston was, as between Stevens

and Elston, in legal effect the same as a registry in the name of Stevens. The obligations which Elston assumed by reason of such registry, were the obligations of Stevens.

And so it was held by WAITE, Chief Justice, that in law Stevens was a shareholder of the bank, though his shares were nominally held and registered in the name of Elston; and that he was answerable in a suit at law for the amount of the assessment. If the views of the late chief justice are adopted here, it will necessitate an affirmance of the decree rendered by the district judge, upon the ground that complainant had an adequate remedy at law.

In *Houghton v. Hubbell*, 33 C. C. A. 574, the circuit court of appeals for the first circuit, as late as January 19, 1899, held to the rule announced in *Davis v. Stevens*. The case was error to review a judgment rendered in the United States circuit court for the district of Massachusetts, in an action at law. The shares of stock on which the assessment had been made did not stand on the books of the bank in the name of the defendant, but the holding was, nevertheless, that the real owner of shares of stock in a national bank which, by his procurement or permission, stand on the books of the bank in the name of an agent and have never been in his own name, may be charged as a shareholder for an assessment made by the comptroller in an action at law. Reference in the opinion is made to the case of *Davis v. Stevens*, and the opinion proceeds:

The last case cited was decided by the late Chief Justice WAITE, sitting in the southern district of New York. The question was like the one under consideration, except that there the actual owner had fictitiously transferred his stock on the books of the bank to another, the difference therefore being that the actual owner in that case transferred his stock to an agent, or a fictitious person, rather than allow it to remain in the name of an agent.

as was done by the owner in this case. It is difficult to perceive, however, that such a situation involves a different principle from that of the question before us. Indeed, the learned justice said, at page 260, 17 Blatchf., and page 177, 7 Fed. Cas.: "The point to be decided now is whether, in an action at law by a receiver of the bank, the real owner of stock in a national bank, standing, by his procurement, in the name of another, and never having been in his own name on the books, can be charged, as a shareholder, with the statutory liability for debts." Again, at page 261, 17 Blatchf., and page 178, 7 Fed. Cas., after discussing the question of the liability of the registered shareholder, the learned justice observes: "The question still remains, however, whether the person for whom the registered owner holds the stock, if actually the owner, may not also be liable." As a result of the reasoning in that case, at page 263, 17 Blatchf., and page 178, 7 Fed. Cas., he said: "I cannot reach any other conclusion than that Stevens, the decedent, was, in law, a 'shareholder' of the bank at the time of its failure, and, as such, liable in this action." The point involved in *Pauly v. Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465, was not precisely like the point before us, yet that case and the one under consideration would seem to be on parallel lines; and Mr. Justice HARLAN, after analyzing the prior cases relating to the liability of shareholders in national banking associations, states the rules deducible therefrom, and among other things says (page 619, 165 U. S., and page 470, 17 Sup. Ct.): "The real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder, within the meaning of section 5151." The reasoning of Chief Justice WAITE in *Anderson v. Warehouse Co.*, 111 U. S. 479, 483, 4 Sup. Ct. 525, is to the same effect. It is according to principle that a burden of this character should rest upon the actual owner, and, as a general rule, there is no safer party to pursue than the actual responsible owner, on whom the ultimate liability must rest. Assuming that an assessment could have been successfully maintained against the agents who stood upon the bank records as owners, still the comptroller might properly, in his discretion, elect to pursue directly the actual known owner. In doing so in this case, the comptroller

elected the more equitable of the legal remedies, and the one which sensibly avoided circuity of action and unnecessary litigation, by striking at once the source upon which, if no exceptional circumstances exist, and necessary remedies were employed by the agents, the statutory burden must finally fall. It cannot be seen that any legal rule interposes, in a situation like this, to prevent reaching a result directly which admittedly can be reached indirectly. Neither can we see any prudential reason for pursuing an indirect legal course when a direct one is fairly and plainly open.

The individual liability provided by the banking act attaches to the *bona fide* owner of the shares when the bank becomes insolvent. The issue as to ownership, except in those cases where it is necessary first to bring all the parties to an actual transfer of shares before the court and set it aside by decree, may always be determined in a suit at law. Thus, it has been repeatedly held that a former stockholder may show in avoidance of an assessment that he had parted with his shares before the bank's insolvency, even though the officers had neglected to make the transfer upon the books, and his name still appeared on the list of stockholders. In such case the stockholder wrongfully sued has his remedy at law, and is not required first to resort to equity for the purpose of enforcing the execution of a transfer upon the books of the bank. Ownership in fact determines the liability, and the issue can be raised in a suit at law and there adjudicated. The bank record is *prima facie* evidence of ownership; but the real fact may be determined without invoking the chancery powers of the court either to decree execution of a transfer, or to cancel a fictitious or colorable transfer. (*Whitney v. Butler*, 118 U. S. 655; *Earl v. Coyle*, (C. C.) 93 Fed. 99; *Earl v. Coyle*, (C. C. A. 3d Circuit) 97 Fed. 410; *Young v. McKay*, (C. C.) 50 Fed. 394.)

The case here is clearly distinguishable from those

where it has been permitted to proceed in equity against both transferrer and transferee. The situation in the latter cases presented an obstacle to the prosecution of the suit at law, and required as incident to enforcement of any assessment against the transferrer, that the transfer be set aside; and to bring the matter within the control of the court, all parties were necessarily impleaded as defendants who were connected with the transfer, and whose rights would be affected by the decree to be rendered. Here the averments of the bill make the case clearly one for a court of law. If the foregoing precedents are to have weight, the ruling of the district judge should be upheld on this specific ground.

V.

If the subject-matter of the bill be held to present a case for equitable cognizance, then the bill was demurrable for want of necessary parties.

THE objection to the bill based upon this ground has not been met by appellant. Appellant's counsel, at page 52, assume that appellee cannot now be sued at law, but this assumption, on the authority cited in the preceding point, is shown to be false. Courts of law on this precise state of facts entertain suits for the enforcement of the assessment, and have power to enter judgment. As heretofore argued, this is not a case where the setting aside of the transfer is an incident or condition precedent to the enforcement of the liability against appellee. The original bill, it is true, contained a specific prayer to set aside the transfer, but the hearing upon that bill having developed the necessity of impleading the other parties to the transfer, complainant in the amended bill omitted to pray for such relief, and sought only a personal judgment. No case has been presented in which a court of equity has entertained a proceeding of this character.

In *Stewart v. Hayden*, 169 U. S. 1, the transferees were before the court and had answered to the bill. They not only assented that the transfer should be set aside, but by cross-bill joined the receiver in a specific prayer that it be done, and that the assessment be charged against their transferrer. The theory on which the amended bill was there framed was that the transfer itself operated to deprive the complainant of his remedy at law, and preliminary and incident to enforcing the assessment against Stewart was the necessity of setting aside the transfer. As the amended bill was there framed, it presented, therefore, a case of equitable cognizance. The supreme court say (page 1):

> The original bill was against Stewart alone, but a demurrer for want of parties having been sustained, an amended bill was filed against Stewart, Gruetter, and Joers.

Nowhere, either in the opinion of the court of appeals, or of the supreme court, is the ruling of the circuit court requiring the transferees to be made parties discredited, nor is it by either of the reviewing courts intimated that without having the transferees before it, the case would have been one of equitable cognizance, or that relief could have been given in equity.

In *Borden v. Johnson*, 107 U. S. 256, cited by appellant to this point, the question of want of necessary parties was not, and, on the record, could not be raised. Mrs. Valentine, the transferee, was in fact joined as a defendant with Johnson, and both defendants united in answering the bill. This fact is recited in the statement of the case, and it is nowhere in the opinion suggested that Mrs. Valentine was not a necessary party to a proceeding in equity to set aside the transfer, nor that without her presence in the case the complainant would have been entitled to relief in equity. The bill in that case was for discovery, as well as relief, and the necessary parties

being before the court, the jurisdiction was sustained. That the bill was there entertained for the purpose of setting aside the transfer as a precedent step to enforcement of liability, is manifest from the following language found in the opinion:

> This being a bill for discovery, as well as relief, and the fraudulent transfer being good between the parties, and only avoidable at the election of the plaintiff, it is clear that equity has jurisdiction *to set it aside* and enforce the liability of the transferrer.

The practice in this class of cases, therefore, has been to follow the well-established rule that in an action to set aside a fraudulent conveyance, the fraudulent grantee or assignee is a necessary party defendant. The powers of the equity court to set aside a fraudulent transfer are exercised only where it has before it all parties to be affected thereby. It is true in this case no affirmative judgment is asked against any other person than the appellee, but in equity the rule as to parties is not dependent upon whether the object of the decree is to impose a liability or to confer a benefit. In either case all of the parties to the contract which the suit seeks to annul or avoid must be before the court. (*Gray v. Schenck*, 4 N. Y. 460; *Tiebout v. Allen*, 13 Gratt. (Va.) 15; *Hamlin v. Wright*, 23 Wis. 491; *Walker v. Powers*, 104 U. S. 245, 251.) It is clear, therefore, that until the transferees are made parties, the court is powerless to grant any relief other than that which may be had at law; and that for want of these parties the bill is demurrable.

A person who is entered on the books of a national bank as the owner of stock, but who is admitted to hold the stock in trust for the true owner, is not liable as a stockholder for the debts of the bank, when the true owner has been adjudged liable; and this is true even though nothing has been realized upon the execution on such judgment. Creditors cannot hold both apparent and real owners. (*Yardley v. Wilgus*, 56 Fed. 965.)

There seems to be no specific holding against the doctrine announced in the above case. If, by reason of a questionable transfer, the receiver is not able to determine who is the proper person to pursue for enforcement of the assessment, and resort to equity in such case is permissible, even then correct practice would require both persons possibly liable to be impleaded as parties defendant to the bill. In such case, only, could a bill for discovery be justified or effective. For then, on ascertainment of the real owner, judgment on any contingency could be rendered against the person liable, and possible necessity of two suits avoided; and the rights of the defendants, as between themselves, could also be determined. Unless the case presented by the bill involves some such equitable considerations, there would be no necessity for resort to equity. Where there is a sole defendant sought to be held liable as owner of the shares, a full and complete remedy is afforded by the action at law, as shown by the authorities cited in the last preceding point.

The lower courts in determining the case applied doctrines universally recognized and enforced in favor of suitors in the same situation in which they found the appellee. Appellant, therefore, has no just ground of complaint, and the judgments of the circuit court, and the circuit court of appeals, dismissing the bill, should be affirmed.

Respectfully submitted,

HALLECK F. ROSE,

Counsel for Appellee.

Lincoln, Neb., Oct. 21, 1901.

Supreme Court of the United States.

No. 95.—October Term, 1901.

John W. McDonald, Receiver, &c., Appellant, vs. David E. Thompson. } Appeal from the Circuit Court of Appeals for the Eighth Circuit.

[February 3, 1902.]

This was a bill in equity originally filed May 20, 1898, in the Circuit Court for the District of Nebraska, by Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, (of whom the present appellant is the successor in office,) against David E. Thompson, to recover defendant's proportion of an assessment upon the stockholders of the bank to the amount of the par value of their shares. The bank failed on January 23, 1893, and a receiver was shortly thereafter appointed. On June 10, 1893, the Comptroller of the Currency ordered the assessment, which was made payable July 10, 1893.

The bill alleged Thompson to have been the owner of 210 shares of the capital stock, which he had acquired upon subscription to such stock and as a part of the original issue; that he, knowing the bank to be in a failing condition and practically insolvent, and in anticipation of its approaching failure, had sold and caused such stock to be transferred to certain irresponsible parties, and that such transfer was made with intent to defraud the bank, its depositors and creditors.

Defendant demurred upon the ground that it appeared by the bill that the cause of action was barred by the statute of limitations. The demurrer was sustained, the bill amended, another demurrer interposed and sustained, and the bill dismissed. An appeal was taken to the Circuit Court of Appeals, which affirmed the judgment of the Circuit Court.

Mr. Justice Brown delivered the opinion of the Court.

This bill is founded upon R. S. sec. 5151, which declares that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares," &c. By section 5234 the Comptroller of the Currency is authorized to appoint a receiver of insolvent banks, who "may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders."

The case turns upon the applicability of the State statute of limitations, which, so far as it is material, reads as follows:

"SEC. 5. Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued.

"SEC. 10. Within five years, an action upon a specialty, or any agreement, contract or promise in writing, or foreign judgment.

"SEC. 11. Within four years, an action upon a contract not in writing, express or implied; an action upon a liability created by statute other than a forfeiture or penalty."

As the cause of action in this case accrued on July 10, 1893, when the assessment was made payable, (*Hawkins* v. *Glenn*, 131 U. S. 319; *Glenn* v. *Marbury*, 145 U. S. 499; *Thompson* v. *German Insurance Company*, 76 Fed. Rep. 892; *Van Pelt* v. *Gardiner*, 54 Neb. 701,) and the action was begun on May 20, 1898, more than four but less than five years thereafter, the case really turns upon the question whether the action is upon a "contract or promise in writing," or "upon a contract not in writing, express or implied," or "upon a liability created by statute." If the cause of action be upon a written contract, the action was brought in time. If upon a contract not in writing, or a statutory liability, the statute of limitations is a complete bar.

Used in this connection and as distinguished from a contract not in writing, express or implied, we think it entirely clear that section 10 contemplates an action between the immediate parties or their privies to a written contract, and that the only contract covered by that definition in this case is the one arising from the allegation of the bill that Thompson was the owner of 210 shares of the original capital stock, and "that he acquired the same upon subscription to such capital stock," and by a receipt of certificates for such shares. The only contract to be gathered from this allegation is one between the bank on the one hand and the defendant on the other, by which the latter agreed to take and pay for a certain number of shares, and the former agreed to issue certificates to him for the same. Had the action been brought upon this contract, as for instance by the bank to recover an unpaid assessment upon the original shares, the case would have fallen within section 10, and the suit might have been brought within five years.

But there was no contract in writing with the creditors or depositors of the bank, and none with the bank itself, to which the receiver could be said to be a privy, except to pay for the stock as originally issued. Granting there was a contract with the creditors to pay a sum equal to the value of the stock taken, in addition to the sum invested in the shares, this was a contract created by the statute, and obligatory upon the stockholders by reason of the statute existing at the time of their subscription; but it was not a contract in writing within the meaning of the Nebraska act, since the writing—that is, the subscription—contained no reference whatever to

the statutory obligation and no promise to respond beyond the amount of the subscription. In none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied from the express contract of the stockholders to take and pay for shares in the association. (*Carrol* v. *Green*, 92 U. S. 509, 512; *Terry* v. *Little*, 101 U. S. 216; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364; *Matteson* v. *Dent*, 176 U. S. 521; *Whitman* v. *Oxford National Bank*, 176 U. S. 559.)

While section 10 does not use the words "express contract" but the words "contract or promise in writing," we think that, taken in connection with section 11, which is confined to contracts not in writing, express or implied, express contracts are primarily and principally intended by the earlier section. These are defined to be those contracts in which the terms of the agreement are fully and openly incorporated at the time the contract is entered into, while implied contracts are such as arise by legal inference and upon principles of reason and justice from certain facts, or where there is circumstantial evidence showing that the parties intended to make a contract. (2 Black. Com. 443.) As contracts for subscription to stock contain no stipulation with reference to the rights of creditors and depositors, it is clear that such rights can only be asserted upon the theory that the subscriber impliedly bound himself to respond to any liability arising indirectly from his contract of subscription.

Whether the promise raised by the statute was an implied contract not in writing or a liability created by statute, it is immaterial to inquire. For the purposes of this case it may have been both. The statute was the origin both of the right and the remedy, but the contract was the origin of the personal responsibility of the defendant. Did the statute make a distinction between them with reference to the time within which an action must be brought it might be necessary to make a more exact definition; but as the action must be brought in any case within four years, it is unnecessary to go farther than to declare what seems entirely clear to us, that it is not a contract in writing within the meaning of section 10 of the Nebraska act. (*Hawkins* v. *Furnace Company*, 40 Ohio St. 507.)

Plaintiff, however, insists that defendant's contract, here sought to be enforced, was not entered into between him and the bank, but between him and the creditors of the bank; that the order of the Comptroller of the Currency for the assessment of the shareholders did not create a cause of action or set the statute of limitations running, nor in any way affect the validity or duration of the right which belongs to the creditors to have this liability enforced; and that the action, not being upon the contract of subscription but upon the contract of the shareholder with the creditors of the bank, entered into by himself with the creditors through the agency of the officers of the bank, different considerations

apply, and the statute of limitations does not operate as a bar so long as there are any outstanding claims against the bank.

In support of this proposition we are referred to section 2 of the act of June 30, 1876, (19 Stat. 63,) which declares: "That when any national banking association shall have gone into liquidation under the provisions of section 5220 of said [Revised] statutes, the individual liability of the shareholders provided by section 5151 of said statutes may be enforced by any creditor of said association, by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof," &c.; and we are cited to several cases holding that claims against shareholders under similar statutes do not become barred until the expiration of the time at which the claims against the corporation also became barred.

There are several answers to this position. Section 5220, to which the second section of the act of June 30, 1876, is supplementary, contemplates only a voluntary liquidation, providing, as it does, that "any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock." (*Richmond* v. *Irons*, 121 U. S. 27, 47.) Now, the Capital National Bank did not go into voluntary liquidation, but, as averred in the bill, "the Comptroller of the Currency of the United States became and was satisfied of the insolvency of the said Capital National Banking Association," and thereupon appointed a receiver. In other words, the proceedings were taken under section 5234 as supplemented by section 1 of the act of June 30, 1876, authorizing the Comptroller of the Currency to appoint a receiver when the association had refused to pay its circulating notes and is in default, or he is otherwise satisfied of its insolvency.

But it is also sufficient to say of this that the action is not brought by the creditors under the second section of the act of June 30, 1876, but by the receiver under R. S. sec. 5234. In such cases no debt becomes due to the receiver as such until a deficiency has been ascertained and an assessment made, when the statute begins to run. (*Scovill* v. *Thayer*, 105 U. S. 145; *Hawkins* v. *Glenn*, 131 U. S. 319.) Upon the theory of the plaintiff, if the statute of limitations were pleaded, it would become necessary for the receiver to show that there were outstanding claims against the bank which were not barred by the statute, and therefore that the bill might be maintained. This would involve a departure from the whole theory of the bill in this case, which is based upon the allegation that the Comptroller of the Currency made an assessment upon the stockholders June 10, 1893, payable July 10, from which latter date plaintiff *claimed interest*. Defendant demurred to this upon the ground that the bill *set forth a cause of action* barred by the statute, and plaintiff went to a hearing upon this demurrer and was defeated. Obviously he cannot now set up

a right to recover, if the creditors had brought a bill under another statute, to which no allusion is made in the bill in this case, and which provides for a wholly separate and independent remedy.

Plaintiff's final contention, that no cause of action arises until a demand has been made, is also fully met by the allegation of the bill that on June 10, 1893, the Comptroller of the Currency made an order in which he declared that he had made an assessment and requisition upon the shareholders, "and that he did thereby make demand upon each and every share of the capital stock of the said association," and directed the receiver to take proceedings by suit to enforce the individual liability of the shareholders. Having made this allegation himself, we do not understand upon what theory the plaintiff now assumes that no demand was made.

In the view we take of the statute of limitations, we have not thought it worth while to consider the points made by the defendant that the action should have been at law and that the bill is defective for the want of proper parties.

There was no error in the decree of the court below, and it is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.